#### WEBINAR SERIES

Updates on President Biden's "Path Out of the Pandemic" Action Plan

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#### PrestigePEO Webinar Today's Presenters

#### Melissa Yannalfo, Client Success Specialist - Host

Melissa Yannalfo is the Client Success Specialist at PrestigePEO. Melissa has an extensive background in account management with a focus on Human Resources and has a dedicated focus on the client experience through a holistic approach to the PEO Service Model. Melissa has been with Prestige for 3 years.

#### Samantha J. Monsees, Associate, Fisher Phillips - Presenter

Samantha Monsees is a member of the firm's COVID-19 Taskforce, COVID-19 Vaccine Subcommittee, and its SBA Loan Team, cross-disciplinary groups of attorneys dedicated to advising employers on the many workplace law aspects of the global coronavirus pandemic, vaccine and mask mandates, and related COVID-19 legislation.



#### Today's Agenda

- Vaccine mandate
- Which employers will be covered?
- When will the ETS be issued?
- State plan states
- Unanswered questions
- What should you do?

- DOL comments
- Accommodations
- What actions are required?
- Direct threat to workplace
- ADA in the age of Covid-19

#### Webinar Forum

All participants are muted.

Please type questions in the side navigation panel and we will try to address most questions during today's session. Today's presentation will be posted on our website under Resources/ThePrestigePerspective



## Path out of the Pandemic

President Biden's six-pronged strategy to combat COVID-19

- Includes vaccine mandates for federal contractors and many healthcare workers.
- Requiring all employers with 100+ employees to ensure their employees are vaccinated or tested weekly.
- Requiring employers to provide paid time off to get vaccinated.

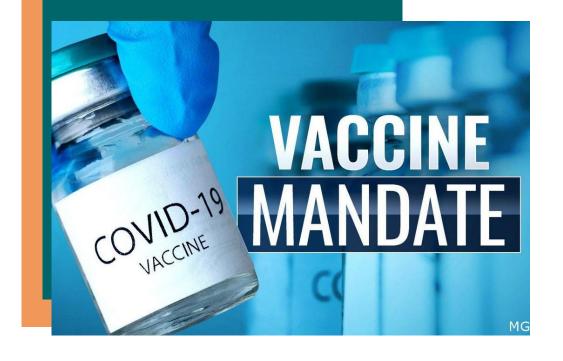






## Vaccine Mandate

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- Biden's plan involves OSHA issuing a vaccine/testing rule that will apply to all private employers with more than 100 employees.
- Estimated to impact 80 million workers, or two-thirds of the country's workforce.
- Rule will take the form of an Emergency Temporary Standard.
  - Allows the agency 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 penalties of up to \$14,000 per violation.



#### Fisher Phillips

## Which employers will be covered?

- ALL employers covered by the OSHA act must comply with the forthcoming ETS.
- Includes many office-based employers who do not regularly interact with OSHA.
  - Financial institutions
  - Insurance companies
  - Law firms
  - Professional and technical work environments







## When will the ETS be issued?

- OSHA sent the proposed ETS to the White House on October 12, 2021. Not currently available to the public. Could be released in days or weeks.
- OSHA officials have also urged businesses to voluntarily begin the process of adopting vaccination mandates, without waiting for the agency to release the ETS.
- Once issued, the ETS will have immediate effect in the 29 states where federal OSHA has jurisdiction.
- The ETS can remain in place for six months before it must be replaced by a permanent OSHA standard.





## When will the ETS be issued?

Fisher Phillips

- In states where the federal government does not have jurisdiction over workplaces safety, the state agencies will have to adopt the ETS or "just-as-effective measures" within 15 to 30 days.
  - 22 states including Arizona, California, North Carolina, Kentucky, Tennessee, Wyoming
  - https://www.osha.gov/stateplans/
- Governors of some state-plan states have already come out against the ETS, which could set up a battle between state-plan agencies and federal OSHA.



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#### State-Plan States

#### Will remote employees be covered?

- According to comments from OSHA:
  - The ETS will not apply to employees who "never" come to work.
  - But, if the employee ever comes to work, or works outside of the office with others, they will be covered.









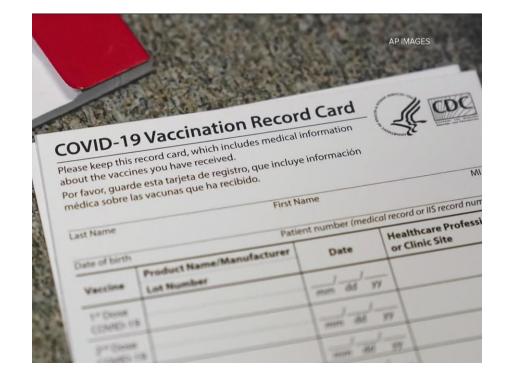
#### How will the 100-employee threshold be counted?

- While not clear in President Biden's announcement, on Sept. 10, OSHA officials confirmed the threshold will be total number of employees, rather than employees at each worksite.
- Could potentially mirror how the FLSA treats related entities.
  - If there is a central operations (HR, Finance, etc.) for multiple companies, all companies may be included in the 100+ count



## Will employers be required to collect proof of vaccination?

- Unclear at this time.
- Consider record retention requirements: OSHA requires record retention for length of employment + 30 years.
- Could have huge recordkeeping implications if required.







#### Who pays for testing?

- Unclear at this time.
- Insurance may cover the cost of tests, and several states have laws predating COVID-19 requiring employers to pay for mandatory medical tests or reimburse employees for any such testing.





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## Do employers have to pay employees for time spent getting tested?

- No clear answer for all employees safest to pay for the time.
- OSHA commented that employer will be required to provide paid time off or use of existing PTO.
- Generally, time spent by employees receiving employerrequired tests should be treated as compensable.
  - If the testing is required during the workday.
  - If necessary to perform the job safely and effectively.







# Will unionized employers be required to bargain over the decision of how to comply with the ETS?

- Unclear to what extent unionized employers will be compelled to bargain over the decision on how to comply with the ETS (or at least the discretionary aspects with respect to vaccines vs. weekly testing).
- At a minimum, be prepared to bargain over the effects of compliance with the ETS.
- Non-union employers should consider the practical implications of compliance from a labor relations perspective.



#### Will the ETS face legal challenges?

- Most likely.
- Governors of many states have already indicated they intend to challenge the ETS.
- Courts may block enforcement of the emergency rule, or parts of the rule, until legal challenges are resolved.
- OSHA will have to prove that there is a "grave danger" to workers.
- But employers should not count on being relieved of all obligations and should prepare now.







#### Adopt Procedures for Determining Employees' Vaccination Status

- Maintain confidential records of employee vaccination status.
- EEOC has indicated it is lawful to ask employees about COVID-19 vaccination status, but this should end your inquiry.
- ETS may require that you collect proof of vaccination.
- Otherwise, create a confidential list of vaccinated workers.
- Review state laws regarding confidentiality and privacy of medical records.





# Determine if you will mandate the vaccine or allow unvaccinated employees to be tested weekly.

- For some employers, collecting and tracking weekly test results may burden them such that they decide to adopt a mandatory vaccination policy.
- OSHA officials stated that employers may require vaccinations without providing the alternative for weekly testing (subject to accommodations).
- If planning for weekly testing, think through the logistics:
  - Onsite or through designated vendors?
  - Payment for testing
  - Payment of time for testing



#### Have a plan for tracking test results.

- You should have a plan in place for collecting and tracking test results.
- Who is going to collect the results?
- When will the test results need to be collected?
- How will you track the results?







#### Have a plan for addressing noncompliance by employees.

- What happens to an employee who does not get tested?
- What happens to an employee who refuses to get vaccinated?





#### Develop a plan for handling accommodation requests.

- Employees may request accommodations for disabilities or for religious reasons under federal or state laws.
- Develop a robust and clear reasonable accommodation policy to address religious and disability issues.
- Communicate and administer the accommodation process thoughtfully, emphasizing individualized, confidential consideration of each request.
- Be prepared for employees to request an accommodation from the weekly testing requirement.





#### **Prepare for OSHA Complaints and Inspections**

- The vaccination ETS will not displace current compliance duties related to COVID-19 prevention and mitigation.
- OSHA will likely ask for your COVID-19 response plan and training records.
- Develop a COVID-19 policy and communicate its requirements to your employees.
- Train managers and supervisors on what to do and say if OSHA arrives for an inspection.



## **DOL** Comments



- OSHA and the DOL held virtual meetings on Sept. 10.
- OSHA indicated that it will not conduct any further listening sessions with outside groups, citing the severe time crunch they are under to complete the ETS.
- Businesses, unions, etc. will be allowed to submit comments after the standard takes effect.
- DOL indicated they have not decided whether employers will be required to cover the cost of COVID-19 testing.



## Other Mandate Considerations

#### **Federal Contractors**

- New EO goes beyond those working on federal property.
- Effective with contracts with pending solicitations, extensions, renewals, or new contracts entered on or after October 15.
- Employees must be fully vaccinated by December 8, with limited exceptions.
- Masks and physical distancing requirements at covered contractor sites.
- Designated person for COVID-19 workplace safety efforts.

#### **Recipients of Medicare and Medicaid**

- CMS will issue temporary regulations
- Scope is broad
- Many healthcare providers will also be covered by the OSHA ETS



#### **Reasonable Accommodations**

- Employers must reasonably accommodate an individual with a disability.
  - Unless doing so constitutes an undue hardship or creates a direct threat.
- Employers must engage in a timely, good faith interactive process with individuals in need of a reasonable accommodation.



## Reasonable Accommodation-Examples

- Job restructuring
- Modified work schedules
- Reassignment
- Modification of equipment
- Modification of examinations
- Training materials
- Temporary leave of absence



## Accommodations That Are Typically Not Reasonable



- Eliminating an essential job function
- Excusing misconduct (in most situations)
- Creating a new job
- Giving a new supervisor
- Providing indefinite leave



## What Actions Are Required?

- Don't bury your head in the sand.
- Employer may have a duty to unilaterally provide an accommodation (e.g., an employee reports to work with a cast on her leg and is using crutches)
- Always consult with HR before approaching an employee.
- Don't want to invite a "regarded as" disability claim.
- Engage in the interactive process.





## When Does An Accommodation Become an <u>Undue Hardship</u>?

- Nature and net cost of accommodation.
- Overall financial resources of the employer.
- Accommodation's impact on employer's operations (e.g., the ability of other employees to perform their duties).



## When Does An Employee Become a <u>Direct Threat</u> to the Workplace?

- Employee must not pose an imminent risk of substantial harm.
- Fear of future harm is not sufficient.
- Evaluation of risk should be based on recent medical judgment and available objective evidence.



## The ADA In the Age of COVID-19

- Employers do not have to permit employees to work remotely if there is no disabilityrelated limitation that would require such accommodation.
- Follow standard procedures to obtain medical documentation that confirms impairment, the restrictions, and the recommended accommodations.
- You can send the employee's physician a medical inquiry if you feel that additional information is necessary (such as other alternatives rather than remote work).



## **Religious Accommodations**

- Under Title VII employers are prohibited from discriminating against employees and applicants based on religion.
- Employers must make reasonable accommodations for employees' religious beliefs, observances, and practices unless the accommodations create undue hardship.
  - "Undue hardship" = accommodation requires more than a de minimis cost or burden to your organization (lower than ADA's "significant difficulty or expense" standard).





## What Is A Sincere Religious Belief?



- Generally, employers should assume the employee's request is based on a sincerely held religious belief.
- However, if the employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer may be justified in requesting additional information.
- Employers should not question the sincerity of an employee's belief at the outset of the request.
- How does an employer determine that a belief is sincerely held or religious?
- EEOC guidance lists the following factors that can undermine whether someone's belief is sincerely held:
  - The employee has behaved in a manner markedly inconsistent with the professed belief.
  - The accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons.
  - The timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons).
  - The employer otherwise has reason to believe the accommodation is not sought for religious reasons.



## COVID-19 Vaccine Requirements and Religious Accommodations

- Engage in the interactive process with the employee to discuss their request and determine the accommodation that can be provided.
  - Accommodations that can be considered:
    - Wearing a face mask or N95
    - Submitting to regular testing for COVID-19
    - Working a modified shift
    - Reassignment
    - Remote work
    - Combination of the above





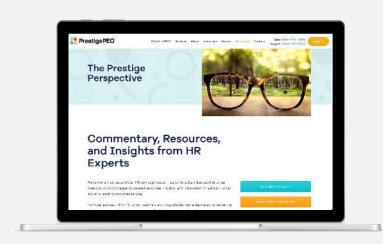
#### Document the Process!



- To start the interactive process, the employer should gather information from the employee regarding the disability/religious belief. In this context, we recommend providing employees with a reasonable accommodation request form.
- An employer may require that the employee provide documentation from the medical provider most familiar with the employee's disability in order to confirm the employee's specific limitations and need for accommodation. However, documentation from a religious leader should not be required unless there is an objective basis to request additional information.
- Document all communications with the employee related to the disability/religious belief and the employer's efforts to accommodate the disability/religious belief.
- Employers should keep all information collected from employees about their request and need for accommodations confidential.
- All medical documents should be maintained in a standalone file separate from the employee's personnel file.
  - Remember: vaccination status is considered confidential medical information and should be treated as such.



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