

## **Teneo Risk White Paper**

### *Public Health Advisory*

September 17, 2021

#### **Mandatory Vaccine Mandates - An Ongoing Debate**

On Thursday, September 9, the White House announced a mandate that all employers with 100 or more employees must require staff to be fully vaccinated against COVID-19 or produce a negative COVID-19 test weekly. President Joe Biden directed the US Department of Labor's Occupational Safety and Health Administration (OSHA) to issue an Emergency Temporary Standard (ETS) to implement this requirement, which is expected to be issued in the coming weeks and would impact an estimated 80 million private sector workers, though it is unclear when the rule would take effect. OSHA will be responsible for formulating and enforcing the rule, and the ETS can only be enacted if exposure to COVID-19 constitutes a "grave danger" and its test-or-vaccine rule is "necessary to protect employees from such danger." However, the agency is significantly understaffed, and it has been noted in news outlets that its emergency rulemaking mechanism has a mixed track record, indicating a potential lack of enforcement. Additionally, the mandate is facing significant opposition, largely from Republican leaders, along with promised legal challenges.

#### **OSHA's Use of the Emergency Temporary Standards**

Emergency Temporary Standards are used by OSHA to accelerate urgent rules and have only been used 10 times in the 50-year history of OSHA's existence. It should be noted that according to the Congressional Research Services, courts have invalidated or halted four of those rules and partially blocked one. ETS action was most recently used in June 2021 to institute rules in healthcare settings to halt the spread of COVID-19. This rule took approximately five months for OSHA to develop after an executive order by President Biden. Following the June 2021 ETS, two labor unions that wanted the standard expanded to cover other industries challenged the rule in court; the lawsuit is currently ongoing in the U.S. Court of Appeals for the District of Columbia.

Prior to the June 2021 ETS, OSHA's last ETS was issued 38 years ago in 1983. Currently, OSHA has approximately 800 safety and compliance inspectors to cover the more than 100,000 private-sector companies that will be impacted by the new mandate. While OSHA has authority to fine employers up to \$13,600 per violation of the new rule, the agency's staff shortage and lack of resources will challenge its effectiveness. In 2019 former President Donald Trump reduced OSHA's staff to the lowest level since the early 1970s, but current President Biden and many congressional Democrats are pushing to increase the agency's funding.

It has been reported across several news outlets, including in Reuters and the Society for Human Resource Management, that OSHA has largely failed to hold employers accountable for unsafe workplace conditions during the pandemic, with regulators either never inspecting facilities or taking months to do so. For employers cited by OSHA for COVID-19 safety violations, it has been reported that two-thirds had not paid fines, and more than half appealed the citations.

## Expected Legal Challenges Face Established Court Precedent

Promises of legal challenges immediately followed President Biden's announcement of the mandate. However, longstanding court precedent maintains that mandatory vaccinations are constitutional, with federal courts rejecting constitutional challenges to government vaccine mandates provided they do not single out one demographic group in a discriminatory way. In 1905, the Supreme Court ruled 7-2 in *Jacobson v. Massachusetts* that mandatory vaccinations are constitutional, establishing this longstanding court precedent. In the case, the Board of Health of Cambridge, Massachusetts, passed an ordinance that criminalized by a \$5 fine the refusal of anyone over age 21 to be vaccinated against smallpox. Henning Jacobson refused to be vaccinated on the grounds that he became ill from a childhood vaccination and was criminally prosecuted. Jacobson appealed the case to the Supreme Court arguing that the vaccine mandate violated his constitutional right to make autonomous decisions about his own body. The Supreme Court rejected his challenge and Justice John Marshall Harlan, who is known for defending civil liberties, wrote that the Constitution:

*“does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint... On any other basis, organized society could not exist with safety to its members.” also, “Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.”*

## Mandate Satisfies Court's Standards

The Supreme Court's opinion also explicitly recognized that the government's power to mandate vaccination is constitutionally precluded from compelling any individual to receive a vaccine that will harm that individual's health – dictates to which President Biden's plan adheres. Not only does President Biden's vaccine mandate not criminalize vaccine refusal, it also does not require vaccination, since employees would be allowed to submit to regular COVID-19 testing instead. When developed, the rule must also include a medical exemption to the vaccine in order to satisfy the Supreme Court's ruling in *Jacobson v. Massachusetts*, which is expected to be part of the rule when it is announced.

Other constitutional challenges based on the free exercise clause of the First Amendment, guaranteeing the freedom of religion, against mandatory vaccination laws in the lower federal courts have also failed. In the 1990 case *Employment Division v. Smith*, Justice Antonin Scalia wrote for the majority that the clause does not relieve an individual from complying with a law that applies to the general population and does not directly single out a particular group, though the issue of vaccines was not explicitly addressed in this writing. President Biden's mandate allowing for either testing or vaccination for private companies appears to satisfy this standard.

Once OSHA issues its ETS, the mandate will likely be challenged in courts for various reasons. James Sullivan of the law firm Cozen O'Connor has speculated that the mandate could be vulnerable to legal challenges because months have passed since vaccines became widely available, potentially making it difficult for OSHA to justify why COVID-19 is a grave danger now but not earlier this year. Additionally, Sullivan argues that courts may find that the 100-employee threshold in the mandate is arbitrary, which could lead to the rule being invalidated. However, a defense for the later implementation of the mandate could be tied to the Biden administration and OSHA waiting for vaccines to gain full US Food and Drug Administration (FDA) approval, not just emergency use authorization (EUA). In addition, regarding the potential for the 100-employee threshold being considered arbitrary, it could be argued that COVID-19 is likely to spread at higher rates in company facilities that employ more staff.

### **Business Community Applauds Mandate Despite Ongoing Debate**

While legal challenges are expected in the coming months following OSHA's ETS announcement, many companies have welcomed the mandate. Joshua Bolten, president of the Business Roundtable, an influential group of large American companies representing employers of 20 million workers, said in a statement that the "Business Roundtable applauds the [Biden] Administration for its leadership and continued efforts to defeat the pandemic. We share the Administration's goal of getting as many eligible Americans vaccinated as quickly as possible, which is key to combatting COVID, keeping vulnerable Americans safe and accelerating the economic recovery." Additionally, the Consumer Brands Association, which is a consortium of 2,000 packaged goods brands, applauded the vaccination effort, with the group's CEO stating that they "look forward to working with the administration to increase vaccination rates of essential workers throughout the country." However, many, including the Consumer Brands Association, have also called for clarity on how they are expected to enforce the new rule, though this clarity likely will not come until OSHA publishes its ETS.