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STEVEN N. DAVI
Executive Director
Email: sdavi@alliedbuilding.org
Mobile: 516.361.8211

BULLETIN

To: Membership of Allied Building Metal Industries, Inc.

From: Steven N. Davi

Date: September 13, 2021

Re: Path Out of the Pandemic Plan

Late last week, on September 9, 2021, President Biden released a comprehensive new Covid-19 action plan called [Path Out of the Pandemic](#). The Plan includes proposed mandates that, when enacted and implemented, will require employees working for large private employers, the federal government, federal contractors, and healthcare entities to be vaccinated against Covid-19. The Plan also includes other proposed mandates of peripheral interest to employers, including requirements that large entertainment venues screen patrons for vaccine status upon entry, and expanded access to federal financial assistance for many businesses.

Private Sector Employers of 100 or More Employees

The Plan directs the Department of Labor's Occupational Safety and Health Administration (OSHA) to develop an Emergency Temporary Standard (ETS) that will require all private sector employers with 100 or more employees (i) to ensure their workforce is fully vaccinated or (ii) to require their unvaccinated workers to provide a negative COVID-19 test result at least once per week before coming to work. The ETS will also require covered employers to provide employees paid time off to get vaccinated and recover from side effects associated with the Covid-19 vaccine.

Important details regarding the ETS are not yet known, such as how the ETS will be worded and implemented, what the timeline will be for its issuance and implementation, and how compliance with its terms will be policed (although The *Wall Street Journal* reports that businesses that fail to comply with the vaccine mandate could face [a fine of up to \\$14,000](#)). In the meantime, it is worth noting that OSHA previously issued an [ETS](#) for employers in the healthcare sector only, as well as several [Fact Sheets](#) and approximately 100 [FAQs](#) specific to the healthcare sector ETS, in or around mid-June, 2021. Whether the upcoming ETS applicable to all private sector employers with 100 or more employees will look similar to the healthcare ETS is unclear at this time.

Executive Branch Employees, Federal Contractors

The president also signed two executive orders last week that, respectively, mandate vaccinations for all [executive branch employees](#) and for some [employees of some federal contractors](#). These orders supplement the president's [July 29, 2021 directive](#) that required employees and onsite contractors to disclose their vaccination status and, if they were not vaccinated, to mask, socially

distance, and undergo regular testing. The new orders eliminate the testing option for those who are not vaccinated unless they receive an approved exemption.

The newly-created Safer Federal Workforce Task Force has been ordered to issue guidance by September 24 regarding exactly what is going to be required of federal contractors in this context. Whatever requirements are established by the Task Force will “apply to any workplace locations (as specified by the guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument.”

Healthcare Employers

The president’s Plan also provides that the Centers for Medicare and Medicaid Services (CMS) will begin requiring vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement, including but not limited to hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies.

Large Entertainment Venues Must Require Proof of Vaccine or Negative Test

The president is also calling on entertainment venues like sports arenas, large concert halls and other venues where large groups gather to require that their patrons be vaccinated or show a negative test upon entry. This provision may serve to preempt or supplement similar state and local orders requiring the same or similar businesses to inquire into patrons’ vaccination status, such as [Key to NYC Pass](#).

Expanded Access to Federal Assistance

The Plan provides for expanded federal financial assistance to certain businesses. Specifically, the Plan would strengthen the Economic Injury Disaster Loan (EIDL) program by, among other improvements, expanding the amount of funding available to any one business from \$500,000 to \$2 million, which can be used to hire and retain employees, purchase equipment or inventory, or pay off higher-interest debt. Moreover, the Plan would improve the Paycheck Protection Program (PPP) by allowing eligible employers with PPP loans of \$150,000 or less a new streamlined approach to seek forgiveness of such debt.

Testing

To expand access to testing, the Plan calls for a federal investment of nearly \$2 billion to procure 280 million rapid and at-home Covid-19 tests, increasing the availability of these tests for employers that require employees to undergo regular testing. Medicaid will also be required to cover at-home tests.

Nonetheless, in many cases, employers that offer employees the option of regular Covid-19 testing in lieu of vaccination could face significant associated costs. In some jurisdictions, including New York, there is the possibility that employees’ time spent undergoing Covid-19 tests would be deemed compensable time. And while employers with fewer than 500 employees that offer paid leave for employees to be vaccinated are [entitled to tax credits](#) under the American Rescue Plan, this tax credit provision is only in effect until September 30, 2021, absent another extension. The president’s Plan also does not directly address who will pay for regular Covid-19 testing for unvaccinated workers, and neither the Department of Labor nor OSHA has provided details about whether OSHA's upcoming ETS will include guidance or requirements about who is responsible for paying for the tests. As a result, there is an air of uncertainty hovering over the

president's Plan, not merely regarding [who should pay](#) for Covid-19 tests in this context, but regarding whether the Plan itself can withstand [legal challenge](#).

We will continue to monitor and report on any further developments where these matters are concerned. As always, if you have any questions or wish to discuss any of the above, please do not hesitate to contact me directly.