



# ABA Staff Analysis: Impact on Banks of President Biden's COVID-19 Action Plan

September 2021

On September 9, 2021, President Biden announced his “COVID-19 Action Plan” (Action Plan) — a wide-ranging set of policies to address the COVID-19 pandemic. None of the policies announced is specific to banks. However, two of the actions could potentially have an impact on your institution:

1. President Biden directed the Occupational Safety and Health Administration (OSHA) to develop an emergency temporary standard (ETS) that will require all employers with 100 or more employees to have all employees be fully vaccinated or be tested weekly for COVID-19.
2. An [executive order](#) that requires federal contractors to follow the COVID-19 safeguards published by the federal government's Safer Federal Workforce Task Force.

Each of these actions — and their potential application to banks — is described in detail below.

It has been widely reported that several governors and possibly others plan to file legal challenges to the ETS once that standard is issued. The ABA Policy team is reviewing how banks may be affected by the Action Plan and will keep members apprised of our analysis as these issues evolve.

## I. Requirement that Workers at Firms Employing 100 or More Employees Be Vaccinated or Tested Weekly

In the Action Plan, President Biden announced that OSHA is developing an emergency temporary standard that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated against COVID-19 or require any workers who remain unvaccinated to be tested weekly for COVID-19 and receive a negative test result before coming to work. Under the [Occupational Safety and Health Act of 1970](#) (OSH Act), OSHA may issue an ETS if the agency determines that “employees are exposed to grave danger” from exposure to toxic or physically harmful substances or agents and that the ETS is “necessary to protect employees from such danger.”<sup>1</sup> An ETS may be in place for no more than six months, at

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<sup>1</sup> Occupational Safety & Health Admin. Act of 1970, § 6(c)(1), 84 Stat. 1590.



which time OSHA must promulgate a (non-temporary) standard through the normal rulemaking process.<sup>2</sup>

In a call with ABA and other industry stakeholders on September 10, 2021, a senior OSHA official stated that this mandatory vaccination requirement would not apply to workers who never come to the worksite (i.e., are fully remote) or interact with other individuals in connection with their employment. The official also stated that the ETS would require employers to provide paid time off to employees to receive the vaccine and recover from any side effects.

In addition, the OSHA official stated that the ETS would be released “as expeditiously as possible . . . in the coming weeks,” but did not provide a more definitive timeline. OSHA confirmed during the September 10 call that there would be no opportunity for the public to comment before the ETS is released and becomes effective.

The ETS likely would become effective very soon after its release. The last ETS that OSHA released (regarding COVID-19 protocols for [healthcare settings](#)) was effective 11 days after its release. However, OSHA has not suggested that it would immediately begin enforcement actions after the effective date of the forthcoming ETS, or that banks in particular would be subject to scrutiny.

Many believe OSHA's expected release of this ETS rests on a weaker legal foundation than the healthcare ETS, which was released on June 10, 2021. One or more State governors and potentially others are expected to file lawsuits seeking an injunction once the ETS is released. Courts rigorously assess whether OSHA is acting within its statutory authority when releasing an ETS. According to [research](#) conducted by the Congressional Research Service (CRS), OSHA has issued an ETS on nine occasions. Courts have fully vacated or stayed the ETS on four occasions and partially vacated the ETS on one occasion, according to CRS.<sup>3</sup>

ABA will follow closely any litigation that is commenced against the ETS.

## II. President Biden's Executive Order Requiring Federal Contractors to Follow the COVID-19 Safeguards Published by the Safe Federal Workforce Task Force

As part of the Action Plan, President Biden also issued an [executive order](#) (2021 Executive Order) that requires federal contractors to follow the COVID-19 safeguards published by the [Safer Federal Workforce Task Force](#) (Task Force). The White House's summary of the Action Plan indicates that the Task Force will require federal contractors to require that all of their workers are vaccinated. The Executive Order states that the Task Force will publish COVID-19 protocols required of federal contractors by September 24, 2021.

The issuance of the 2021 Executive Order raises the question of whether banks are federal contractors subject to the order's requirements. A long-standing [FAQ](#) issued by the Department of Labor's Office of Federal Contract Compliance Programs concluded that banks are federal contractors by virtue of the fact that they accept deposit insurance. Despite this

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<sup>2</sup> *Id.*, § 6(c)(3).

<sup>3</sup> Scott D. Szymendera, Analyst in Disability Policy, Cong. Research Svc., Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19, at 6 (updated July 13, 2021).



conclusion, and as explained in detail below, there is reason to believe that the 2021 Executive Order does not apply to the vast majority of banks.

In imposing obligations on federal contractors, the 2021 Executive Order defines federal “contract” using language that is drawn from the Department of Labor’s 2014 [final rule](#) implementing an [executive order](#) that President Obama issued in 2014 to establish a minimum wage for federal contractors (2014 Rule).<sup>4</sup> The 2014 Rule’s definition of federal “contract” focused on procurement and service contracts — i.e., contracts where the contractor is *providing services to the federal government*. That contractual relationship is very different from the relationship between the federal government and a bank that accepts deposit insurance but does not provide any service to the federal government. In addition — and significantly — there never was a suggestion that the definition of “contract” in the 2014 Rule applied to banks that only have a deposit insurance relationship with the federal government. Consequently, based on the enforcement precedent set in 2014, ABA believes that the 2021 Executive Order will not be enforced against the vast majority of banks.

The 2021 Executive Order, however, applies to businesses that entered into a contract with the federal government “in connection with federal property or lands and related to offering services for Federal employees.” This makes it clear that banks that operate on federal property — e.g., in a federal building or on a military base — are subject to the requirements of the Executive Order.

Banks also may conduct other business with the federal government where the Executive Order’s application to the bank is not immediately clear. For banks that do business with the federal government (outside of the deposit insurance context), we recommend the bank consult with counsel regarding the Executive Order’s potential applicability.

### **III. Suggested Action Steps for Banks in Response to Requirement that Workers at Firms Employing 100 or More Employees Be Vaccinated or Tested Weekly**

As discussed above, the emergency temporary standard requiring mandatory vaccination or weekly testing for unvaccinated workers is expected to be challenged in court. Some believe it is likely that a court will enjoin the ETS, delaying its effective date or invalidating the ETS altogether. Consequently, banks may wish to consider carefully the resources and effort they expend at this time to develop a program in anticipation of compliance with the ETS. Below are three action steps that banks may wish to take now.

First, banks should continue to urge all employees to become vaccinated. A bank can provide its employees with an incentive to receive a COVID-19 vaccine, but the bank must be prepared to respond to employees who cannot receive the vaccine because of a medical disability or sincerely held religious belief.<sup>5</sup> If a bank offers a monetary incentive for employees to receive a

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<sup>4</sup> Establishing a Minimum Wage for Contractors, 79 Fed. Reg. 60,634, 60,723 (Oct. 7, 2014) (§ 10.3).

<sup>5</sup> Among other requirements, the Americans with Disabilities Act requires that an employer provide a reasonable accommodation that permits an employee with a disability to “enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.” U.S. Equal Emp’t Opportunity Comm’n, *The ADA: Your Responsibilities as an Employer*, <https://www.eeoc.gov/publications/ada-your-responsibilities-employer> (last visited Sept. 11, 2021).



COVID-19 vaccine, an employee who cannot receive the vaccine because of a disability may seek a reasonable accommodation that permits the employee to obtain the monetary incentive through another means.

Second, banks should ask for proof of vaccination (i.e., submission of a vaccine card) from employees who are vaccinated and track the vaccination status of all employees, if the bank is not already taking these steps. This step would entail only a modest amount of effort from banks and would help the bank identify the number of employees who would be subject to a mandatory vaccination or weekly testing requirement, should the ETS survive legal challenge.

Third, banks may consider requiring all employees to become vaccinated now. In August, the U.S. Food and Drug Administration approved the Pfizer-BioNTech COVID-19 vaccine for individuals 16 years of age and older. This action removed any uncertainty over whether employers may require employees to become vaccinated. If a bank implements a vaccine requirement at this time, it can do so on its own schedule and terms.

ABA will continue to track developments with the Biden "COVID-19 Action Plan" and provide updates as appropriate.

Questions? Contact ABA's [Paul Benda](#) or [Jonathan Thessin](#) for more information.