Protesters opposing COVID-19 vaccine mandates hold a rally in front of City Hall in downtown Los Angeles. DAMIAN DOVARGANES / AP

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Will Federal Employee Unions Challenge Biden's Vaccine Mandate in Court?

Several major labor groups said they won't, but some are leaving open the possibility.

COURTNEY BUBLÉ | SEPTEMBER 23, 2021

UNIONS | WHITE HOUSE | CORONAVIRUS

While several major federal employee unions said they won't challenge the Biden administration's vaccine mandate in court, some are leaving open the possibility.

On September 9, President Biden announced a vaccine mandate for federal employees and contractors, unless they request an exemption. Further guidance issued on September 16 says that employees must show proof of vaccination or could be subject to disciplinary measures. The reaction to the mandate from lawmakers was along party lines, with Democrats coming out in favor of it and Republicans contesting it. From unions it was a little more mixed, and that holds true especially when it comes to a possible legal challenge.

The National Federation of Federal Employees "understands and respects the differing perspectives of its individual members on matters regarding vaccines, mask

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mandates and social distancing," said the union in a statement on September 14. "We have considered the likelihood of success on a legal challenge to the mandates contained within the EO. More than 100 years of legal precedent exists confirming the authority of employer-required mandates and vaccines, and the courts at all levels have consistently rejected challenges to this type of mandate. Therefore, NFFE has determined it will not legally challenge the executive order requiring federal employees to be vaccinated against COVID-19."

The union—which represents about 110,000 federal employees—added it is talking with the Biden administration about the "progressive discipline" for those who do not get vaccinated as "NFFE believes no employee should be fired in connection with this mandate."

National Treasury Employees Union "members, like American society at large, will have differing reactions to the new policy," said NTEU National President Tony Reardon in a statement on September 3. "Either way, the law is clear that employers, including the federal government, may implement a vaccination requirement for employees." The union has 150,000 federal employee members.

"We have thoroughly evaluated the text of the executive order and any potential legal arguments for and against it. No potential arguments or avenues were ignored," said the American Federation of Government Employees, which represents about 700,000 federal and D.C. government workers, to members in an email on September 16, obtained by *Government Executive.* "However, based on the order's express provision for exceptions required by law, along with a long line of Supreme Court and other federal cases upholding vaccinations in the interest of public health, as well as other cases foreclosing primary court jurisdiction over a federal union's challenge to an employment-related executive order, a direct legal challenge or lawsuit over the order is unavailable."

Additionally, "While the scope of bargaining is likely to be limited, our union will make sure that workers have a voice in all those areas that are negotiable."

However, the division of AFGE that represents Federal Bureau of Prisons employees has a different take.

"Our position has not changed, as Mr. [Shane] Fausey indicated in his email dated September 10, 'We are actively pursuing the legal landscape and any and all options that have the potential to protect our members,' " said an email from Council of Prison Locals C-33 leadership to members on September 17, obtained by *Government Executive.* "Furthermore, 'We will exhaust all legal options to protect our members.' With that in mind, as with all other executive orders that have been thrusted upon us, everything takes time. We are working every avenue we can."

When asked about the difference of opinions, AFGE directed *Government Executive* to a "frequently asked questions" page on its website that explains its legal stance, among other things. The BOP union declined to comment further on the difference.

Attorneys for the National Border Patrol Council spent several days looking into possible legal challenges to the mandate and they "determined the EO was legal and that there was no viable avenue of challenge," said a statement on September 18. "We, the NBPC executive committee, felt it would be better to seek other opinions from law firms specializing in suing the government prior to drawing a final conclusion. To date, we have not found a reputable firm, nor any other firm, or legal opinion that provides us a legitimate path forward. Notwithstanding the legal opinions to date, and unlike other entities such as the National Treasury Employees Union, we continue searching for an avenue of reprieve."

we will continue working on the issue."

In regard to the mandate overall, the American Postal Workers Union is in a "wait and see mode to learn what the [Occupational Safety and Health Administration]

requirements will be" as it is a "rare government union" that is subject to private sector regulations, said a union spokesperson.

Postal Service employees are not covered by the mandate, but they will be subject to the upcoming emergency temporary standard from the Occupational Safety and Health Administration that will require vaccines for companies with 100 or more employees or require weekly negative COVID-19 tests.

The International Federation of Professional and Technical Engineers was broadly supportive of the mandate, while the Federal Law Enforcement Officers Association (not a union, but a professional association) was against it.

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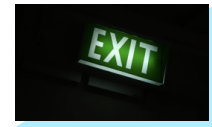

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Confirmation of Biden's picks for MSPB would end unprecedented era of quorum-less board.

ERIC KATZ | SEPTEMBER 22, 2021

MSPB CORONAVIRUS POLITICAL APPOINTEES

President Biden's nominees to run the Merit Systems Protection Board promised during a confirmation hearing Wednesday to act quickly to reduce an unprecedented backlog of cases involving agency personnel decisions and acknowledged they anticipate an onslaught of appeals involving COVID-19 vaccine mandates.

MSPB lost its only Senate-confirmed board member in early 2019 and has not had a quorum since January 2017. While administrative judges have continued to hear cases from federal workers challenging agency personnel actions, more than 3,300 cases have been further appealed to the agency's central board where they have languished, in some cases, for years. Senators on the Homeland Security and Governmental Affairs Committee implored the nominees to act swiftly to address the backlog.

Cathy Harris, nominated by Biden to chair the MSPB, vowed to create a "triage system" to address the outstanding cases. She said she would solicit feedback from the agency's staff, but would consider factors such as length of time pending and severity of punishment to determine which cases to address first. For many cases, she said, the board will issue "short orders" where they can move quickly without offering much in the way of explanations. She also noted as time has passed and employees or managers have moved on, the potential for settlement may have increased. She said she hoped that up to half of the backlogged cases could be settled. Even with those strategies, Harris said addressing the backlog will simply require time and effort.

"The other thing is we just have to roll up our sleeves and get to work," said Harris, an attorney with extensive experience in federal employment law. She noted that it is not just employees who are affected by the longstanding delays, as agencies are also awaiting determinations that "will affect staffing, retention and disciplinary matters."

Tristan Leavitt, whose nomination was recommended by Senate Republicans and who has served as general counsel at MSPB and as the agency's de facto head ever since the board became vacant, said the three board members should take the previously unpracticed step of working through cases together to save time.

Federal employee groups, whistleblower advocates and government watchdogs have all decried the lack of a full MSPB board, suggesting it has left many workers with limited recourse when facing discipline.

"Prolonged vacancies on the board slow the administration of justice, and, for years, vacancies on the MSPB have prevented federal employees from obtaining relief from prohibited personnel practices," Sen. Gary Peters, D-Mich., chairman of the Homeland Security and Governmental Affairs Committee, said on Wednesday.

Leavitt added MSPB also plays a key role in enabling agencies to hold employees accountable.

"A good portion of my career was spent investigating misconduct in the federal government, including by line-level employees, by managers and even by senior leaders," Leavitt said. "Holding such employees accountable is key to upholding the morale of the rest of the federal workforce."

Sen. James Lankford, R-Okla., pressed the nominees on how they would respond to cases when employees challenge disciplinary actions their agencies take after

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refusing COVID-19 vaccinations. Biden has instituted a mandate for the inoculation of the entire federal workforce—allowing for religious and medical exemptions—and agencies are currently in the process of preparing how they will punish workers who do not comply. All three nominees expressed hesitancy in answering the question, noting they did not want to pre-judge a case they were all but certain to receive.

Ray Limon, currently a human resources official at the Interior Department and the third Biden nominee, said currently "we don't have an answer" because the administration is still sorting through the details. He added that having centralized guidance would be essential to ensuring uniform enforcement.

pursue disciplinary measures, up to and including removal from federal service" for any unvaccinated employees who do not receive exemptions. "In pursuing any adverse action, the agency must provide the required procedural rights to an employee and follow normal processes, including any agency policies or collective bargaining agreement requirements concerning disciplinary matters."

Harris said MSPB's purview includes reviewing any guidance coming from the Office of Personnel Management, and she expected the board to scrutinize OPM's policies as they relate to the vaccine mandate. When an individual employee subject to discipline brings a relevant case to the board, she added, it will review the Douglas Factors to ensure any punishment was within reason. Leavitt, meanwhile, suggested case law appears to signal vaccine mandates in the workplace are acceptable.

"Generally, in a lot of cases, if there's a nexus to someone's work, my general impression is they tend to be upheld," he said.

The hearing briefly turned contentions as Sens. Rob Portman, R-Ohio, and Josh Hawley, R-Mo., asked Harris about her history of posting partisan tweets disparaging some conservatives. Harris apologized for some of those messages and promised to take an objective approach in her role at MSPB.

"The tone I took in a few posts on Twitter, it doesn't reflect the day-to-day me," she said. "You won't hear that kind of language from me in my job going forward."

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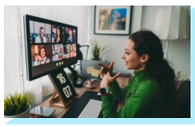

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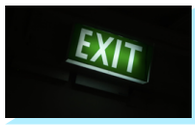

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Then-acting Health and Human Services Department Inspector General Christi Grimm testifies during a remote hearing of the House Oversight and Reform Committee in May 2020. HOUSE TELEVISION VIA AP

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Coronavirus Roundup: HHS Watchdog Nominee Testifies; Union Calls For Vaccine Mandate at All Points of Entry

There's a lot to keep track of. Here's today's list of news updates and stories you may have missed.

COURTNEY BUBLÉ | SEPTEMBER 22, 2021

CORONAVIRUS PUBLIC HEALTH

On Wednesday morning, Christi Grimm, who is performing the duties of Health and Human Services Department inspector general, testified before a Senate committee regarding her nomination to be the permanent watchdog. During a briefing in April 2020, then-President Trump attacked the findings of a report her office issued about the vast shortages of medical equipment and supplies early in the coronavirus pandemic at hospitals nationwide as well as questioned Grimm's credibility. He then announced on May 1, 2020, his intent to nominate Jason Weida, Boston-based assistant U.S. attorney, to be HHS watchdog, but President Biden nominated Grimm for the job.

"Inspectors general perform an essential public service," said Grimm, who has been with the office since 1999. "I've been performing the duties of IG since January 2020, directing oversight of HHS's COVID-19 pandemic response while transitioning a workforce of over 1,600 professionals to a mostly virtual environment. We have not allowed unprecedented challenges to disrupt our mission."

Nominees for a Senate-confirmed position cannot be serving simultaneously in the acting role. Grimm is "principal deputy inspector general performing the duties of the inspector general," an HHS IG office spokesperson told *Government Executive*. "She is not in an acting role at our organization." Here are some of the other recent headlines you might have missed.

The National Treasury Employees Union said it supports the Biden administration's recent decision to require foreign nationals flying to the United States to be vaccinated, and now it's calling for vaccination requirements for all ports of entry. "[Customs and Border Protection] employees have been on the job

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throughout the pandemic, processing legitimate trade and travel, interdicting illegal drugs and products, and inspecting cargo for invasive pests or disease," said NTEU National President Tony Reardon in a statement on Monday. "The least we can do is to make sure everyone they come into contact with is inoculated against COVID-19 and has recently tested negative."

Johnson & Johnson released new data on Tuesday that show a booster dose of its vaccine increases protection against the coronavirus. "The company has provided available data to the U.S. Food and Drug Administration and plans to submit the data to other regulators, the World Health Organization and National Immunization Technical Advisory Groups worldwide to inform decision-making on local vaccine administration strategies, as needed," said a press release.

Health and Human Services Department Secretary Xavier Becerra has taken a "back seat" on the coronavirus response, *Politico* reported on Tuesday. "Administration officials say Becerra's limited role has left the government without a strong intermediary between a fast-moving White House and HHS' methodical scientific agencies — contributing to breakdowns in coordination that have hampered the response and fueled accusations of political interference," said the report. However, "Becerra told *Politico* he believes he's 'absolutely' been empowered as part of the COVID-19 response, and he emphasized his department's involvement in the booster debate and other aspects of the effort."

The Project on Government Oversight released a new report on Tuesday that looks at contracting misconduct during the pandemic. "The federal government awarded a total of $666 billion in contracts in fiscal year 2020, a 13% increase compared to the previous year," the report said. "Over $389 billion of that total, or 59%, went to the top 100 contractors. The federal government's response to the COVID-19 pandemic propelled several new names — and one old one — into the top 100," some of which "have a history of misconduct allegations."

Inside the continuing resolution that the House passed on Tuesday night is $60 million for White House "salaries and expenses," which is "a response to [the Office of Management and Budget's] request earlier this month for funding partly to 'maintain core operations and support additional activities including COVID-19 management and testing,' [according to] a Democratic appropriations spokesperson," *Politico* reported on Wednesday. "OMB warned at the time that without the provision it wouldn't have enough money to 'maintain additional operating requirements for responding to the COVID-19 pandemic,' among other in-house operations."

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has an article about the considerations for the future of telework. "Managers and supervisors should recognize that the optimal approach to telework will continue to evolve over time and may evolve differently within different work units. They should be flexible and open to trying new approaches, working through any issues that may arise," said the article. "Employees also have a role to play in agency telework programs. They should assess their own work habits and preferred routines to determine what level of telework, if any, is right for them. Not all employees or jobs are suitable for telework."

Upcoming: White House Press Secretary Jen Psaki will give a briefing at 1 p.m.

Help us understand the situation better. Are you a federal employee, contractor or military member with information, concerns, etc. about how your agency is handling the coronavirus? Email us at newstips@govexec.com.

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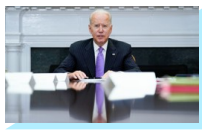

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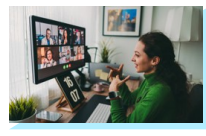

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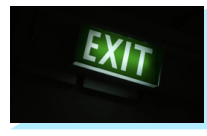

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