

Republicans gird for battle and businesses brace for details of Biden's new vaccine rule

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WASHINGTON – President Joe Biden's planned vaccine requirement faces a number of tests in coming weeks, as at least two dozen Republican-controlled states prepare legal challenges, setting up a clash between the federal government and local officials that could ultimately determine the fate of the rule.

The Labor Department has moved slowly in designing the rule, which White House officials said will require companies with more than 100 employees to institute mandatory vaccination or testing protocols for their staffs.

Top administration officials have been working carefully to ensure the proposal is ironclad, and some have been heartened to see anecdotal evidence that companies and local governments implementing vaccine requirements have seen large-scale cooperation.

As the White House pushes ahead, Biden is traveling to

Chicago on Thursday and is expected to make remarks about the importance of vaccine requirements. The Biden administration hasn't said when it will formally release the policy, which will affect more than 80 million Americans, something the White House believes is necessary to finally slow the coronavirus's spread.

Many business groups have largely praised the White House for its aggressive stance on the pandemic but in recent weeks have pushed for more clarity about how the vaccine requirement will work. They have asked, for example, for more specificity about whom the rule will cover and who will be responsible for financing tests. And some groups have asked for at least 90 days to implement new requirements, though the White House has not signaled whether that is something it will offer.

The fiercest opposition to the proposal, though, has come from Republicans.

Republican attorneys general in at least 24 states are marshaling legal opposition to the pending rule, as governors such as Ron DeSantis of Florida and Henry McMaster of South Carolina vow to fight it.

Arizona, led by Republican Attorney General Mark Brnovich, has already filed suit against the administration, and some state governments including Missouri are pledging to explore

legislation that could exempt their state from the requirement.

Those efforts will only build on existing legal battles in states such as Minnesota, New York, Texas, Michigan, Kentucky, Ohio and others over coronavirus vaccine mandates. Last month, a group of plaintiffs that includes four Air Force officers and a Secret Service agent filed a lawsuit over recently announced vaccination requirements for federal workers, as well as U.S. troops.

"The biggest opposition is going to be politically motivated, among the anti-mask, anti-vax far right," said Judy Conti, government affairs director at the National Employment Law Project, a worker advocacy group. "There may be some overlap there with the business community, but my prediction is that the business community's opposition will be more muted and rational. I think they will probably talk less about individual freedoms and stuff like that, and it will be more about the logistics and complexities of what employers would have to do, making sure it isn't too burdensome. But you're going to see more knee-jerk reactionary opposition from the far right."

The White House, which has made controlling the pandemic its most immediate goal, said in early September that it expected the vaccine requirement to be hammered out in "coming weeks."

Along with stricter mandates that will apply to some federal workers and contractors, the requirement is one of the administration's most ambitious attempts to wrestle the pandemic under control. It will be implemented by the Labor Department's Occupational Safety and Health Administration (OSHA).

The rule is expected to be less stringent than many of the policies being instituted by some states and private companies. That's because the new federal policy will leave room for companies to allow unvaccinated employees to be frequently tested for the coronavirus, something many of the state regulations that apply to health-care workers don't allow. Many of those, and some of the policies instituted by private companies, only give limited exemptions for medical or religious reasons.

The Equal Employment Opportunity Commission, which upholds laws against workplace discrimination, said both private and public employers are legally able to require that their staffs get vaccinated and enforce those policies under the threat of termination.

Those policies have raised strong objections among groups and individuals that have organized in opposition to many of the government measures meant to address the pandemic, like business restrictions, masking requirements and now vaccines.

And that energy is trickling up to elected officials in advance of the federal rule.

Twenty-four Republican attorneys general signed a letter that accused the Biden administration of overstepping its constitutional authority, calling the vaccine requirement “disastrous and counterproductive” – and threatening legal action when the administration proceeds.

They charge that Biden is using workplace rules to try to tackle the broader public health crisis as part of their argument that the OSHA rules will be legally unsound.

In Arizona, Brnovich, who is running in what is expected to be a competitive Republican primary next year to challenge incumbent Democratic Sen. Mark Kelly, was the first to file a lawsuit against the Biden administration over the vaccine requirement. The complaint uses the vaccine requirement to make an argument about illegal immigration, alleging that the coming rule will be unconstitutional because the administration does not have a similar policy for undocumented migrants apprehended after crossing the border.

The White House workplace requirements will not distinguish between employed citizens and noncitizens.

Many previous OSHA rules, such as those to increase injury

reporting during the Obama administration, have typically been met with fierce resistance by the business community, including its most prominent lobbying arm, the U.S. Chamber of Commerce.

But the pending OSHA vaccine plan has not drawn much opposition from the country's main business lobbying groups so far. And none of the lawsuits against local and hospital mandates have involved the Chamber or the National Retail Federation (NRF).

Many businesses, seeing the threat that the delta variant of the coronavirus has posed to the return of work and commerce, have already instituted vaccine requirements for workers voluntarily. White House officials believe one of the biggest effects of the new requirement will be the cover it gives employers who have wanted to institute vaccine requirements but feared backlash from employees.

The lack of robust opposition is a sign of the divergence between the business lobby and the Republican Party, as caustic partisan politics have become the norm in recent years.

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"For years, the Republican Party and the business community have been very much in lockstep, but they're not

anymore on a lot of issues," Conti said. "This is one of those places where I think that fissure will probably become more visible. There will be some opposition to this that is really sort of a knee-jerk political opposition and, quite frankly, formed through some level of misinformation."

The Chamber instead has been focused on trying to get clarity about what shape the requirement will take. It sent a letter to Labor Secretary Marty Walsh on Sept. 16 containing dozens of questions, including about whether the rule will apply to nonprofit organizations, whether remote workers will still have to comply and how OSHA will enforce it.

The NRF and the Retail Industry Leaders Association did the same a few days later, asking Walsh in a letter about the requirement and requesting at least 90 days for its implementation, while commending "the Administration's commitment to defeating the virus."

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Some businesses, like those in industries struggling with

labor shortage issues such as fracking, for example, have expressed reservations about a policy that could turn away even more of their workforce.

Eugene Scalia, labor secretary for former president Donald Trump and a partner at the law firm Gibson, Dunn & Crutcher, said some of his business clients have expressed concerns about the rule.

"If you've got competitors that this doesn't apply to in this incredibly tight job market, then you're going to worry," he said of the 100-employee threshold.

Labor and White House officials involved in drafting the new rule have kept a tight lid on the process because of the legal sensitivities. Labor Department staff are still largely working from home, meaning the high-stakes legal work around the rule is being hashed out by people working remotely.

Officials said they were aware of the potential of blowback to vaccine requirements but said they were not worried about the politics of the requirement. They are confident the rule will be well within the bounds of OSHA's legal authority.

The 1970s Occupational Safety and Health Act allows the labor secretary to create emergency rules, which can be fast-tracked without public comment, to protect employees from "grave danger . . . from new hazards."

"Speaking generally, we've all seen how this pandemic has played out for workers," said Seema Nanda, who as solicitor of labor has a central role in making sure the rule is legally sound. "Certainly, covid is a new hazard and we have quite a bit of evidence in this regard about how it's affecting workers."

Nanda said she disagreed with criticism that the vaccine requirement was an end-around attempt to address a public health crisis that is not workplace specific.

"We definitely have a public health crisis, but we certainly also have an issue with how we're protecting employees in the workplace," she said. "And that is absolutely OSHA's mandate – to protect employees that work, to provide for safe and healthful conditions. So it is certainly a workplace issue."

Nanda said the department's job was not to consider the political implications of the rule, although officials are working to tailor the rule so it will stand up to challenges in court.

"In our rulemaking, we don't think about politics, we think about protecting workers," she said. "We're trying to figure out how we safely protect employees in the workplace from what is essentially a new hazard and we didn't have a few years ago."

There are some early signs that vaccine mandates are working at increasing vaccination rates. At United Airlines, one of the first companies to institute a mandate, some 98.5% of employees are now vaccinated, its chief executive said. Many hospitals in New York went from employee vaccination rates in the 70% to 80% range when the state's mandate was announced a month and a half ago to more than 95% around the deadline this week. Hospitals in California saw similar results.

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