

Biden's vaccine rules to set off barrage of legal challenges



President Joe Biden walks along the Colonnade towards the Oval Office as he returns to the White House after visiting Brookland Middle School in northeast Washington, Friday, Sept. 10, 2021. Biden has encouraged every school district to promote vaccines, including with on-site clinics, to protect students as they return to school amid a resurgence of the coronavirus. (AP Photo/Manuel Balce Ceneta)

WASHINGTON (AP) — President Joe Biden's sweeping new vaccine requirements have Republican governors threatening lawsuits. His unapologetic response: "Have at it."

The administration is gearing up for another major clash between federal and state rule. But while many details about the rules remain unknown, Biden appears to be on firm legal ground to issue the directive in the name of protecting employee safety, according to several experts interviewed by The Associated Press.

"My bet is that with respect to that statutory authority, they're on pretty strong

footing given the evidence strongly suggesting ... the degree of risk that (unvaccinated individuals) pose, not only to themselves but also unto others,” said University of Connecticut law professor Sachin Pandya.

Republicans swiftly denounced the mandate that could impact 100 million Americans as government overreach and vowed to sue, and private employers who resist the requirements may do so as well. Texas Gov. Greg Abbott called it an “assault on private businesses” while Gov. Henry McMaster promised to “fight them to the gates of hell to protect the liberty and livelihood of every South Carolinian.” The Republican National Committee has also said it will sue the administration “to protect Americans and their liberties.”

Such cases could present another clash between state and federal authority at a time when Biden’s Justice Department is already suing Texas over its new state law that bans most abortions, arguing that it was enacted “in open defiance of the Constitution.”

The White House is gearing up for legal challenges and believes that even if some of the mandates are tossed out, millions of Americans will get a shot because of the new requirements — saving lives and preventing the spread of the virus.

Biden is putting enforcement in the hands of the Occupational Safety and Health Administration, which is drafting a rule “over the coming weeks,” Jeffrey Zients, the White House coronavirus response coordinator, said Friday. He warned that “if a workplace refuses to follow the standard, the OSHA fines could be quite significant.”

Courts have upheld vaccination requirements as a condition of employment, both before the pandemic — in challenges brought by health care workers — and since the coronavirus outbreak, said Lindsay Wiley, director of the Health Law and Policy Program at American University Washington College of Law.

Where Biden’s vaccine requirements could be more open to attack is over questions of whether the administration followed the proper process to implement them, she said.

“The argument that mandatory vaccination impermissibly infringes on bodily autonomy or medical decision making, those arguments have not been successful and I don’t expect that to change,” Wiley said. “I think the challenges that are

harder to predict the outcome of are going to be the ones that are really sort of the boring challenges about whether they followed the right process.”

Emergency temporary standards — under which the rules are being implemented on a fast track — have been particularly vulnerable to challenges, Wiley said. But the risks presented by the coronavirus and the existence of a declared public health emergency could put this one “on stronger footing than any other ones past administrations have tried to impose that have been challenged in court,” she said.

Indeed, the question of whether the mandate is legally sound is separate from whether it will be upheld by judges, including by a conservative-majority Supreme Court which has trended toward generous interpretations of religious freedom and may be looking to ensure that any mandate sufficiently takes faith-based objections into account.

Vaccination “has become politicized and there are many Republican district judges who might be hostile to the regulation for political reasons,” said Michael Harper, a Boston University law professor.

“I could imagine an unfortunate opinion that attempted to justify this political stance by rejecting the use of OSHA against infectious disease rather than against hazards intrinsic to the workplace,” Harper wrote in an email.

The expansive rules mandate that all employers with more than 100 workers require them to be vaccinated or test for the virus weekly, affecting about 80 million Americans. And the roughly 17 million workers at health facilities that receive federal Medicare or Medicaid also will have to be fully vaccinated.

Biden is also requiring vaccination for employees of the executive branch and contractors who do business with the federal government — with no option to test out. That covers several million more workers.

Republican-dominated Montana stands alone in having a state law on the books that directly contradicts the new federal mandate. The state passed a law earlier this year making it illegal for private employers to require vaccines as a condition for employment.

But University of Montana constitutional law professor Anthony Johnstone said

the federal rules would trump the state law. That means larger Montana businesses that previously couldn't require their employees to get vaccinated will now likely be required to, including hospitals that are some of the largest employers in the sparsely populated state.

Given that the rules are still being drafted and haven't been released, experts say the devil is in the details. It remains to be seen exactly what the rule will require employers to do or not do, and how it accounts for things such as other rights that unvaccinated employees may assert, such as the right to a disability accommodation, Pandya said.

For example — with the growing number of fully remote businesses and workers — if the rules are written to include people who don't have workplace exposure, “there certainly is room for an issue there,” said Erika Todd, an employment attorney with Sullivan & Worcester in Boston.

Charles Craver, a labor and employment law professor at George Washington University, said the mandate presented a “close question” legally. But he said the Biden administration did have a legitimate argument that such a requirement was necessary for employers to protect the safety of workers, customers and members of the public.

The thornier question, though, is how employers — and courts — will sort through requests for accommodations for employees on religious or other grounds.

Though such accommodations may include having an employee work from home, “you can have a situation where someone has to be present and you can't provide an accommodation because of the danger involved,” he added.

“I would not be a betting person if this went up before the Supreme Court,” Craver said. “I could even picture the court divided 5-4, and I wouldn't bet which way it would go.”

Richer reported from Boston. Reporter Iris Samuels contributed to this report from Helena, Montana. Samuels is a corps member for The Associated Press/Report for America Statehouse News Initiative. Report for America is a nonprofit national service program that places journalists in local newsrooms to

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