



## **VERIFY: Are President Biden's vaccine executive orders legal?**

*Millions of American workers will be required to get COVID-19 vaccines under President Biden's new executive orders.*

*VERIFY: Is it legal for the federal government to mandate vaccines for federal, private employees?*

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September 10, 2021

Nearly nine months after the first COVID-19 vaccine was approved for emergency use, President Biden announced that tens millions of American workers will now be asked to choose between getting the job, facing weekly testing or possibly losing a job.

Nearly 80 million eligible Americans, or 25% of the population, have refused to get one, Biden said in a press conference Thursday. Meanwhile, he said, the unvaccinated "overcrowd our hospitals, are overrunning the emergency rooms and intensive care units."

During the briefing President Biden said that under a new Department of Labor rule, all employers with 100 or more employees must require workers to be fully vaccinated or face weekly COVID-19 testing. These employers must also give their employees paid time off to get vaccinated, according to the new rule developed by the Occupational Safety and Health Administration (OSHA).

The President also announced an executive order requiring all federal employees and federal contractors to be vaccinated against the virus.

This latest announcement replaces Biden's previous call in late July which allowed unvaccinated federal employees and onsite contractors to wear a mask, socially distance, comply with 1-2 COVID tests weekly and be "subject to restrictions on official travel."

The announcement has been controversial, confusing and politically polarizing online, with some people wondering if he can do that at all.

Verify researchers are breaking that question in two—one for federal workers, and one for private companies.

### **THE QUESTION**

Can the federal government require COVID vaccinations for federal employees and contractors?

### **THE SOURCES**

- Lawrence Gostin, Professor of Global Health Law at Georgetown University Law Center
- Stephanie Rapp-Tully, Federal Employment Lawyer and Partner at Tully Rinckey PLLC
- Department of Justice opinion: "Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization"
- U.S. Equal Employment Opportunity Commission: "EEOC Issues Updated COVID-19 Technical Assistance"

## **THE ANSWER**

Yes.

## **WHAT WE FOUND**

Both Lawrence Gostin and Stephanie Rapp-Tully agreed that, generally speaking, the government can require its workforce to get the COVID-19 vaccine.

"The president has clear power to ensure a safe federal workforce," Gostin said. "The Equal Employment Opportunity Commission and the Department of Justice have both said that it's lawful to do it, and there are federal courts that have upheld other workforce mandates."

Gostin said the same goes for federal contractors.

"And then the contractor has a choice: he or she can either decide to get their employees vaccinated, or don't take federal dollars," he said.

Rapp-Tully explained that rules like these must include exceptions for those with medical or sincerely held religious objections.

"If an employee has a disability that would prevent them from being vaccinated, [and a] doctor says that, for whatever reason, medically they cannot get the vaccination, presenting that information to the agency would allow them to be offered a reasonable accommodation," Rapp-Tully said. "At this point, reasonable accommodations are looking a lot like telework."

Another caveat—unions. The federal government would have to negotiate an agreement with unions in order to avoid litigation, Rapp-Tully explained.

In fact, the largest federal union, American Federation of Government Employees (AFGE), released a statement Thursday saying that while they encourage their members to get vaccinated, "workers deserve a voice in their working conditions."

"We expect to bargain over this change prior to implementation, and we urge everyone who is able to get vaccinated as soon as they can do so," the statement reads.

So we can verify, yes, in general, it's legal for the President to mandate that federal employees get the vaccine.

## **THE QUESTION**

Can the federal government require private companies to vaccinate their employees?

## **THE SOURCES**

- Lawrence Gostin, Professor of Global Health Law at Georgetown University Law Center
- Robert Peck, Founder and President of the Center for Constitutional Litigation
- Trevor Burrus, Research Fellow at the Cato Institute Center for Constitutional Studies

## **THE ANSWER**

We did not have a consensus among our legal experts as to whether or not this action is legal.

## **WHAT WE FOUND**

Gostin and Peck both said yes, the federal government can legally require private company employees to get the COVID vaccine, and there's legal precedent in the Supreme Court.

Peck cited the 1905 Supreme Court decision in *Jacobson v. Massachusetts*, when a man fought to be exempt from a state-mandated smallpox vaccine. In a 7-2 decision, the court upheld that he could be required to get vaccinated during the ongoing epidemic.

"[The court said] this was an exercise of the state's authority to address the public health, and it was fully within their power to do so," Peck explained. "He claimed that there were religious reasons, there were just general liberty reasons, they rejected them all."

Peck and Gostin both also cited the Occupational Health and Safety (OSH) Act of 1970 as a legal standard for enacting these requirements. The act allows the Department of Labor to put in place standards for workplace health and safety that companies operating in the U.S. must follow.

Meanwhile, Burrus disagreed, saying the president doesn't have the constitutional power to force a business to require vaccines, and called creating an OSHA rule to mandate vaccines "a stretch."

"[If] you have black mold in your office, OSHA might have jurisdiction over that," Burrus said. "Can they make you get a needle stuck into your arm? Those are the kind of lines that we draw on constitutional law, and I think a lot of judges will draw that line."

So without a consensus among experts, we can't verify an answer on this right now. Both Peck and Burrus agreed that we're likely to see this one fought out in the courts.