



Rights and Wrongs of Biden's New Vaccination Mandate Policies

Some parts are both good policy and legally unproblematic. Others - particularly the mandate imposed on private employers - are legally dubious and would set a dangerous precedent if upheld by courts.

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Yesterday, President Biden announced new policies mandating vaccination for up to 100 million American workers of various types. Some parts of the policy are entirely defensible, and legally unproblematic. But others—most notably the imposition of a vaccination/testing mandate on all private employers with 100 or more workers—are legally dubious and would set a dangerous precedent, if upheld. I am strongly supportive of vaccination, share much of Biden's frustration with anti-vaxxers, and even support vaccination mandates in some situations. But we must remain wary of executive power grabs, even (perhaps especially!) in cases where we might like aspects of the policy in question.

The most defensible part of Biden's program is the vaccination mandate for federal employees. Acting as an employer, the federal government (like other employers) can routinely impose all sorts of conditions that would be illegal if imposed on the general public. Indeed, many requirements routinely imposed on employees are far more onerous than vaccination, including even such things as having to show up to work every day! The latter is a far more significant restriction on liberty than getting vaccinated; it takes up many hours of your time and effort every day, while getting the shot takes only a short time, and afterwards you can soon get on with your life, as normal. If imposed on the general public, a work requirement would violate the Thirteenth Amendment's prohibition of "slavery" and "involuntary servitude." As a condition of holding a federal job, it is perfectly constitutional.

With the possible exception of employees who have contracts that somehow preclude vaccination (if any such exist), this part of Biden's policy is legally unproblematic. It likely makes good policy sense, as well.

The associated mandate imposed on employees of federal contractors is, perhaps, only slightly more contentious. It depends on the extent of the executive's statutory authority to impose conditions on federal contractors that aren't directly related to carrying out their jobs. I will leave this one to people who know more about the law of federal contracts than I do. But I will note

there is a long history of imposing a variety of conditions on such contractors, some of which are not directly related to the effective performance of their duties.

Things get more dicey when we consider the vaccination mandate for employees of hospitals and other health care facilities receiving federal funding. As a policy matter, this mandate makes excellent sense, as health care workers often have to interact closely with patients who are unusually vulnerable to Covid, and those patients sometimes have little choice but to accept the ministrations of the specific doctors and nurses they encounter. Legally, however, it is not entirely clear whether the statutes in question authorize the imposition of vaccination funding.

As co-blogger Josh Blackman points out, such clarity is especially important when we consider the case of state-run medical facilities. There, Supreme Court precedent requires that spending conditions be "unambiguously" stated in the authorizing statute. The Trump administration repeatedly ran afoul of this requirement in its efforts to pull federal funds from sanctuary cities. Whether Biden runs into the same problem here, remains to be seen. Before offering a considered judgment, I would like to know more about what statutes the administration plans to cite as authorization for this particular mandate. Unlike in the case of Trump's assault on sanctuary jurisdictions, I have considerable sympathy for the policy objective in this case. But my sympathy isn't enough to make it legal.

Unlike Josh, I am skeptical that state governments will be able to successfully challenge the health care facility spending condition on the grounds that it is "coercive." In *NFIB v. Sebelius*, which Josh cites, the Court invalidated as "coercive" a provision of the Affordable Care Act that threatened to pull all Medicaid funding from states that refused to comply—an amount equivalent to some 10-20% of most states' total budget. If I understand the Biden condition correctly, all it would do is pull federal funding from specific health care facilities that refuse to impose vaccination requirements on their employees. This is unlikely to punch a major hole in any state's overall Medicaid funding (most of which is not tied to specific health care facilities), much less in the state's budget as a whole. Still, this is another issue that probably requires closer consideration when and if a specific case arises.

The really problematic element of Biden's plan is the requirement that all employers with 100 or more workers impose a requirement of vaccination or regular Covid testing on their entire workforce. This affects some 80 million workers (though a large percentage are likely vaccinated already), and the legal authority for it is dubious, at best.

The Administration plans to impose this requirement by using the Occupational Safety and Health Administration's (OSHA) power, under the 1970 OSHA Act, to impose an "Emergency Test Standard" in cases where the agency determines "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards."

The ETS provision allows OSHA to impose regulations without going through the normal "notice and comment" process, and other procedural requirements. For that reason, as Walter Olson of the Cato Institute points out, courts have subjected previous ETS policies to nondeferential judicial review, and have often struck them down. ETS has only been used nine times before, and in five of those instances (of the six that got litigated at all), courts have struck down at least part of the resulting policy. None of the previous uses of ETS were anywhere near as sweeping as this one.

It's not hard to see how the present ETS may be vulnerable. A virus, like that at the root of the present pandemic, arguably doesn't qualify as a "substance or agent." These terms generally refer to chemicals, liquids or man-made dangers, not living things.

Perhaps it counts as a "new hazard." But it's not clear that, in this context, the term "hazard" includes all dangers of any kind, or is limited by the previously listed terms ("substances or agents"). Perhaps a "new hazard" is simply a dangerous substance or agent that is novel, as opposed to one that, as the statute puts it, has already been "determined to be toxic or physically harmful." In addition, 19 months into the pandemic, it's not easy to claim that Covid is a "new" hazard, at all. By now, it has been well known for quite some time.

Finally, does Covid really pose a "grave danger" to employees when the vast majority of them can easily minimize it by getting vaccinated voluntarily, thereby almost completely eliminating the risk of serious illness and death? If "grave danger" exists even in cases where it is easily avoidable, OSHA would have near-boundless authority to issue ETS regulations on almost any workplace practice.

Virtually any workplace activity poses grave dangers to at least some people, if none of the latter can be expected to take even minimal precautions on their own. For example, parking a car in the employee parking lot creates a grave danger for people who refuse to move out of the way when they see a car coming (even if the driver is driving carefully). Along the same lines, it is worth noting that the vaccination/testing mandate applies even to employees who work at home, despite the fact that the latter pose little or no threat to other workers.

The above discussion of the ETS statute may seem like petty legalistic carping. Hairsplitting word games at a time when lives are at stake may seem like exactly the kind of thing that (justifiably) gives lawyers a bad name.

But if the administration prevails on this issue, it would set a dangerous precedent, and undermine the constitutional separation of powers. In order to uphold this ETS requirement, courts would have to rule that the statute authorizes OSHA to issue emergency regulations for dangers that 1) are not limited to chemical "substances or agents," 2) are not really all that "new" and 3) can easily be greatly mitigated by the people the agency seeks to protect.

In combination, these conclusions would allow OSHA to restrict or ban almost any workplace practice. And they could do it without having to go through the notice and comment process, or other procedural constraints that normally apply to major regulations.

If you think the Biden administration can be trusted to wield such vast power responsibly, consider whether you will have similar faith in the next Republican administration. Think of what Donald Trump or Ron DeSantis might do with such a vast power.

Such massive delegation of power by Congress would also make the statute constitutionally suspect under the nondelegation doctrine, which was a key issue in the recent litigation over the CDC eviction moratorium. There must be at least some limits on the amount of lawmaking power Congress delegates to the executive. A power to suppress almost any workplace activity of any kind likely runs afoul of that.

Ultimately, the Supreme Court ruled against the moratorium primarily because it ran afoul of the rule that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers

of "vast 'economic and political significance.'" The power OSHA claims here is comparably "vast," and congressional authorization far from clear. For that reason, there is a good chance that courts will ultimately rule against the administration in this case, as well.

The administration's goal of getting as many people vaccinated as possible is a laudable one, that I wholeheartedly support. But it should be pursued by means that avoid executive power grabs likely to set dangerous precedents.

UPDATE: I should, perhaps, add that it is unlikely that any of these mandates can be successfully challenged on individual rights grounds, as opposed to issues of federalism and separation of powers. The Supreme Court's 1905 ruling in *Jacobson v. Massachusetts* likely precludes such challenges, except perhaps in a few extreme cases (e.g.—if an employee can show getting vaccinated would create severe health risks for her, but the administration still tries to force vaccination). Perhaps some employees might be able to secure religious exemptions to the mandate. But such cases are likely to be rare.

UPDATE 2: In the original version of this post, I wrote that courts had struck down at least part of the challenged policy in all six instances where OSHA ETS regulations were litigated in court. In reality, it was "only" five of the the six. I apologize for the error, which has now been corrected.

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