

ALERT

Biden Mandates Vaccines for Federal Contractors, Signals Coming Mandates for Businesses with Over 100 Employees

September 15, 2021

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WHAT: As many anticipated, President Biden issued two Executive Orders (EOs) on Thursday evening, September 9, 2021, mandating vaccinations, one for federal employees—Executive Order 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees—and the other for federal contractors—Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors. The EOs direct federal agencies to: (1) implement programs requiring COVID-19 vaccinations for all federal employees, with exceptions only as required by law, and (2) ensure that contracts, and contract-like instruments, include a clause requiring contractors to comply with all guidance, for the duration of the contract, published by the Safer Federal Workforce Task Force (Task Force). The EOs call for the Task Force to issue guidance by September 16.

In his speech announcing the EOs and expressing general disappointment at the slowdown in vaccination rates, President Biden also announced that he has tasked the U.S. Department of Labor (DoL) with issuing an emergency rule requiring all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any unvaccinated workers to produce a negative COVID-19 test at least once a week. While DoL's rule is still forthcoming, the potential impact on American employers will be dramatic. Furthermore, President Biden announced a new policy that will implement a COVID-19 vaccine mandate for all hospitals that receive federal Medicare or Medicaid funding which is expected to impact

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roughly 50,000 healthcare providers.

Executive Order on Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors: Section 2 of the EO mandates a clause for all covered contractors and subcontractors that specifies that the contractor or subcontractor shall comply with all Task Force guidance for contractor or subcontractor workplace locations (assuming that guidance is approved by the Office of Management and Budget). The “workplace location” will be specified by the Task Force and is described in the EO as any location “in which an individual is working on or in connection with a Federal Government contract or contract-like instrument,” which could dramatically increase the reach of the clause. The EO further directs the Federal Acquisition Regulation (FAR) Council to amend the FAR to include the clause and to take initial steps by October 8, 2021, to direct agencies to use the clause through use of their authority under FAR 1.4. FAR 1.404 authorizes agencies to issue class deviations to implement contract clauses that affect more than one contract. The EO directs agencies by October 8 to take similar steps to include the clause in contracts that are not subject to the FAR and that are entered into after October 15, 2021.

The EO also specifies that nothing in the order should be construed as allowing noncompliance with any applicable state law or municipal ordinance establishing more protective safety protocols than those established by the Task Force or with any more protective Federal law, regulation, or agency instructions. The EO applies to all procurement contracts and “contract-like instruments,” for services, construction, or leasehold interests in real property, including contracts covered by the Service Contract Act, contracts for concessions (such as those on military bases), and contracts in connection with federal property or lands and related to offering services to federal employees, their dependents, or the general public. The EO also applies to solicitations, extensions or renewals, and exercises of options for contracts or contract-like instruments for these types of contracts. Notably, the EO does not apply to subcontracts solely for the provision of products. The EO also exempts (1) grants; (2) contracts/agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act; (3) contracts or subcontracts below the simplified acquisition threshold; and (4) employees who perform work outside the United States or its outlying areas.

The EO is effective immediately and will apply to new covered contract actions entered into or taken on or after October 15, 2021. For solicitations issued before the effective date or contracts issued within 30 days of the effective date, agencies are “strongly encouraged” to include the “safety protocols” of the required clause.

Forthcoming DoL Rulemaking: Per President Biden’s announcement, the DoL, through the Occupational Safety and Health Administration (OSHA), is developing a rule that that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. Violations of this rule are expected to carry a \$14,000 fine per violation, although how a violation will be defined is still unknown (*i.e.*, per unvaccinated employee or per worksite). OSHA has stated that it will implement the requirement through an Emergency Temporary Standard that is expected in the coming weeks. Although the final form of this rule is still unknown, the requirement is expected to impact over 80 million private-sector employees.

WHAT DOES IT MEAN FOR INDUSTRY: The EO will affect a significant segment of the federal contractor community, as the exemptions are fairly limited. DoL's rules will affect an even larger segment of the overall U.S. workforce.

Regardless of the final form, any DoL rule mandating that employers take responsibility for ensuring their employees are vaccinated will create a myriad of issues for private employers, many of whom are already struggling to ensure their employees are vaccinated despite incentive programs and existing mandatory vaccination policies. Every employer, federal contractor or not, will have to become familiar with the process for granting accommodations, as well as the privacy requirements of the Americans with Disabilities Act (ADA).

Federal contractors should be prepared for new solicitation and contract clauses pursuant to the EO as well as modifications to contracts entered into prior to the EO's effective date, particularly those that are extended, renewed, or subject to options. Contractors should be prepared to identify any cost increases as a result of any such modifications and, if so, collect supporting records to support any requests for equitable adjustment or claims. Likewise, contractors should be attuned to contractual modifications that implement these requirements. It is not uncommon for modifications to be "bilateral," or agreed to by the contractor, or include release of claims language. Contractors will need to ensure that they reserve and do not waive any rights they may have to recover for increased costs.

It is likely that both the EOs and any rule issued by DoL will be subject to legal challenges, but in the meantime, employers are encouraged to:

- Determine whether they are or may be covered by either EO or the upcoming DoL Rule;
- Review and update existing vaccination policies or work with counsel to create a policy;
- Review and understand privacy requirements under the ADA; and
- Develop a clear process for accommodations requests that comply with the ADA and the provisions of the EO.

The edict from the White House is clear: the Government expects everyone who can to get vaccinated. Pushing the responsibility from the individual to the employer may cause significant headaches, but it is also likely to assist with achieving the desired outcome.

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