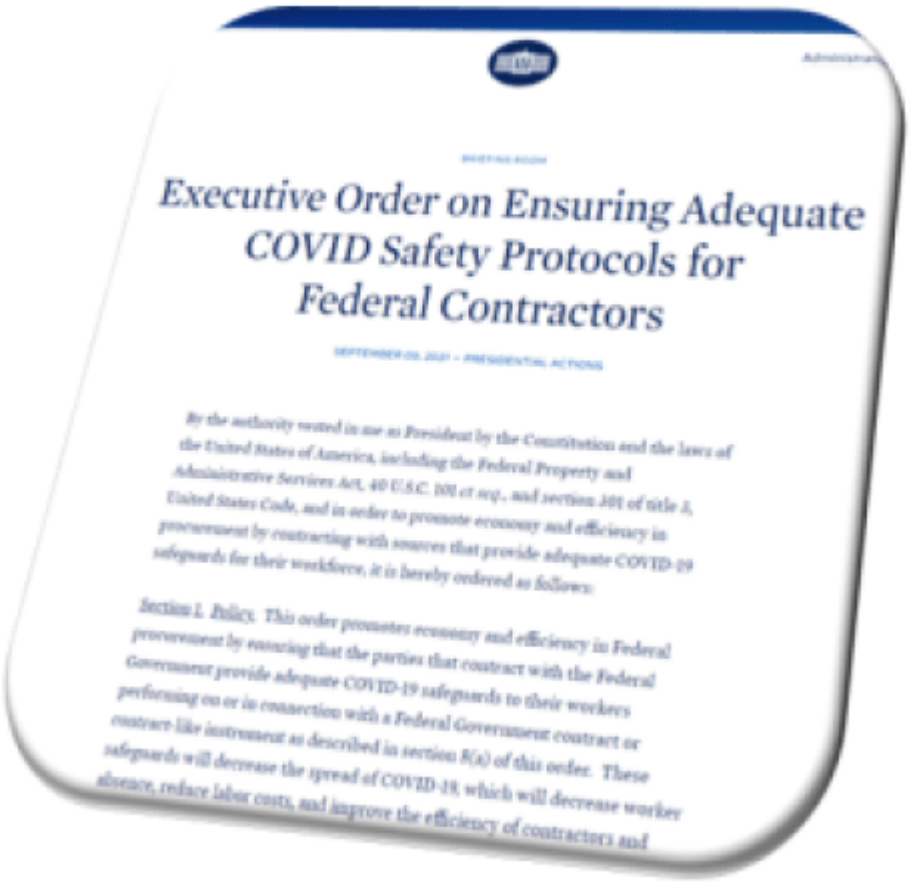
OCTOBER 7, 2021 | LEGISLATIVE & STANDARDS BOARD UPDATES

President Biden's Broad COVID-19 "Hard" Vaccine-Mandate for Federal Contractors

*By **Conn Maciel Carey's COVID-19 Task Force***

While we have been mostly focused on the September 9th directive from President Biden to fed OSHA to issue a COVID-19 vaccination / testing emergency temporary standard, that was hardly the only major move the Administration announced on the vaccine-mandate front. This update will focus on federal contractors – companies that provide services to the federal government through direct contracts with federal agencies and through subcontracts in support of federal contracts.

On the same day last month that Pres. Biden announced the OSHA "soft" vaccine mandate for private employers that serve only private customers, he also issued an executive order (EO) setting three new requirements for federal contractors at all tiers:



Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., and section 301 of title 3, United States Code, and in order to promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce, it is hereby ordered as follows:

Section 1. Policy. This order promotes economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument as described in section 8(a) of this order. These safeguards will decrease the spread of COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and

1. Setting a "hard" vaccine mandate – "Covered Contractor Employees" must be fully vaccinated by December 8, 2021 (and thereafter before starting to work on any federal contract);
2. Designating a COVID-19 safety coordinator to communicate requirements to employees and non-employees at your "Covered Contractor Workplaces"; and
3. Ensuring all individuals at a "Covered Contractor Workplace" comply with CDC masking and distancing guidance.

For months now, since January 2021, contractors and subcontractors working in-person on federal property have already been required to provide a self-certification that they were fully vaccinated OR had received a recent negative COVID-19 test. (*See* EO 13991 – "Protecting the Federal Workforce and Requiring Mask-Wearing"). The new EO for federal contractors eliminates the "testing-out option" and expands the mandate beyond just federal properties to also cover private workplaces, or really any place at all, where an individual is working in support of a covered federal contract.

Only those unvaccinated employees who are "legally entitled to an accommodation" for medical or religious reasons may continue to be employed to work on federal contracts. There are no exceptions for people who previously were infected and recovered. Anti-body tests are not acceptable to prove vaccination status. Under limited special circumstances involving an "urgent, mission critical need", a federal agency may allow certain individuals who are not fully vaccinated to continue working for only up to 60 days from beginning the work on a

covered contract or in a covered workplace.

Another development of this federal contractor mandate is that employers must review covered employees' official documentation to verify vaccination status (i.e., the white card or an official record from a health department database), and self-attestation is not an acceptable substitute.

Who is covered by the various requirements of the EO?

Covered Contractor Employees include full- or part- time employees of a covered contractor (i.e., a prime contractor or subcontractor at any tier that is party to a covered contract) working on or in connection with a covered contract, or working at a covered contractor workplace. Covered contracts are those contracts and contract-like instruments entered into anew on or after November 14th, as well as existing contracts for which an option is exercised or an extension or amendment is made after that time. The contracts must be valued at $250,000 or more and must not be solely for the provision of goods/products.

Work "on a covered contract" includes employees performing service directly called for by a covered contract from any US location, including their own homes, even if the employee never works at a covered contractor workplace. Work "in connection w/ a covered contract" includes employees with duties necessary to the performance of the covered contract, but who are not directly engaged in performing the specific work called for by the covered contract; e.g., HR, billing, legal review, etc.

A covered contractor workplace is a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract. And here is where the scope of the EO really balloons – covered contractor employees includes all employees working in that covered contractor workplace, even if the employees do no work on or in connection with a covered contract, so long as there is any potential to "mix" with employees who do work on or in connection with a federal contract. Mixing includes any potential to come into contact with each other anywhere at the covered contractor workplace, such as in a common building lobby or restrooms.

In short, anyone working in the US where work is performed for the federal government is covered by the vaccine mandate aspect of the EO, including individuals working remotely from their private residences. This includes federal government buildings and federally owned property (anywhere the federal government conducts official business), as well as all private entity locations owned, leased or operated where work on a federal contractor is performed. This includes outdoor workplaces, as well.

What has happened since the EO issued?

Over the three weeks since the President issued the new EO on September 9th, the President's COVID-19 Task

Forcehasissuedguidanceabouthowthat EOwillbe implemented, the Federal Acquisition Regulatory Council announced that it will undertake a formal notice-and-comment rulemaking to amend the FAR to implement the EO, and the FAR Council released the contract term that will be incorporated into covered federal contracts. Specifically:



- *September 23*: The Safer Federal Workforce Task Force issued guidance about how this EO is to be implemented ("Task Force Guidance").
- *September 29*: DOE issued a federal register notice seeking public comment on the agency's methods of information collection through automated technology for certification of vaccination status for onsite support service contractor employees. In the coming weeks, we expect that other federal agencies will seek public comment on their procedures for collection of COVID-19 vaccination status in various electronic formats.
- *September 30* – a lot happened:
  - The FAR Council released the text of the Federal Contractor Vaccination Mandate Clause ("New Clause"):

Compliance. The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at https:/www.saferfederalworkforce.gov/contractors/.

Subcontracts. The Contractor shall include the substance of this clause, including this paragraph, in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

  - The Federal Acquisition Regulatory Council issued a memorandum to federal agencies awarding contracts subject to the Federal Acquisition Regulations ("FAR"), and directed them to incorporate the New Clause into solicitations and new contracts. The FAR Council memo includes "strong encouragement" to contracting officers at GSA to incorporate the vaccination mandate to non-covered contracts, and asked the agencies to publish their own guidance by October 15th. Two agencies did so on that same day:
    - The Department of Defense ("DOD") published a "Class Deviation" directing contracting officers on how to incorporate the New Clause into the DFARS, and use bilateral modification to incorporate the

DFARS clause into existing contracts, task orders and delivery orders.

- The General Services Administration ("GSA") issued detailed instructions on the New Clause to contracting officers and included templates for communicating with contracting parties on new and existing contracts.

In addition to addressing requirements for contracts covered by EO 14042, the FAR Council memo reiterated that the Task Force Guidance is to be applied "broadly' to include contracts awarded prior to November 14th, solicitations issued before October 15th, and contracts that are not covered because they are below the $250,000 threshold or they are only for the sale of goods.

Soon we will see a proposed amendment to the FAR memorializing this EO as a regulatory requirement. There will be opportunity for public comment on the proposed amendments, but the President has directed federal agencies to implement the New Clause into new and amended federal contracts even before that rulemaking is completed.

Contact any of the attorneys from Conn Maciel Carey LLP's national OSHA Practice if you have any questions or if you need any help developing policies to come into compliance with the new federal contractor vaccine mandate.

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