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The Federal Contractor Vaccine Mandate: What You Need to Know

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State Responses to Vaccine Mandate

- ***NATIONWIDE PRELIMINARY INJUNCTION PROHIBITING ENFORCEMENT GRANTED***
- Numerous states have filed lawsuits challenging the contractor mandate:
 - Southern District of Georgia (Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, and West Virginia)
 - Southern District of Texas (Texas)
 - Middle District of Florida (Florida)
 - Eastern District of Missouri (Montana, Alaska, Arkansas, Iowa, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, Wyoming); and
 - Eastern District of Kentucky (Kentucky, Ohio, and Tennessee)
- Primary arguments:
 - Unconstitutional / exceeds presidential authority
 - Improperly circumvented notice-and-comment rulemaking
 - Rule itself is arbitrary and capricious (e.g., does not promote efficiency)
 - Requires compliance with shifting guidance
 - Etc.

Covered Contracts

- The EO applies broadly to prime and subcontracts at all tiers
 - Limited exceptions:
 - Grants
 - Contracts/agreements with Indian Tribes
 - Contracts/subcontracts below the simplified acquisition threshold (currently \$250k)
 - Employees who perform work outside of the U.S. and its outlying areas
 - Subcontracts solely for the provision of products or solely performed outside of the U.S. and its outlying areas
- Agencies are encouraged to apply mandate even more broadly
- Implementation is through contract clauses

Covered Contractor Workplaces

- Vaccination required for all employees of a covered contractor who:
 - Work “on or in connection with” a covered contract or
 - Work at a covered contractor workplace
 - Unless an exemption is granted (medical or religious)
- “Covered contractor workplace”:
 - Any location “controlled by a covered contractor”
 - At which any employee who works “on or in connection with” a covered contract is “likely to be present”
 - Does not include a covered contract employee’s residence

Takeaway: If any employee “likely to be present” at a contractor workplace works “on or in connection with” a covered contract, all employees who work at that location must be vaccinated

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Carveouts for Specific Locations

- Considerations:
 - Are there any employees at the location who perform work “on” federal contracts or subcontracts?
 - Any employees who perform “in connection with” federal contracts/subcontracts?
 - Any employees from other offices who perform “on or in connection with” federal contracts/subcontracts who are “likely” to visit?



November 1st Guidance

- Updated FAQ Issued by Safer Federal Workplace Taskforce:
 - Contractors may retain non-compliant employees after mandate deadline; the contractor should “determine the appropriate means of enforcement”
 - “Model” approach to enforcement is that of federal agencies – e.g., “a limited period of counseling and education, followed by additional disciplinary measures if necessary. Removal occurs only after continued noncompliance.”
 - “Where covered contractors are working in good faith and encounter challenges with compliance with COVID-19 workplace safety protocols, the agency contracting officer should work with them to address these challenges. If a covered contractor is not taking steps to comply, significant actions, such as termination of the contract, should be taken.”

November 1st Guidance

- White House Briefing
 - Emphasized that the Government's focus will be on whether the contractor is **“working to comply”**
 - E.g., no contract termination for non-compliance on deadline if working toward compliance
 - Will look to whether the contractor:
 - Has appropriate policies (e.g., masking, distancing, and vaccination)
 - Is communicating the policy to employees
 - Is collecting documentation regarding vaccination status
 - Is engaging in outreach, education, and counseling for non-compliant employees
 - Encouraged contractors to **work with their Contracting Officer** regarding next steps if unable to persuade employees to get vaccinated

November 4th Guidance

- Deadline for covered contractor employees to have final vaccine dose extended to **January 4, 2022**
- OSHA Emergency Temporary Rule issued
 - Applies to employers with 100+ employees
 - Requires vaccination or weekly testing after January 4th
 - Does not apply to workplaces covered by the federal contractor mandate

Modifications Implementing EO 14042

- Bilateral vs. unilateral modifications
 - Important to reserve rights to recover added costs if the modification is bilateral
 - Added costs may include:
 - HR expenses – e.g., processing accommodation requests, responding to employee questions, addressing non-compliance
 - Legal expenses
 - Recruiting/personnel costs if the contractor ultimately must replace employees
 - Costs of implementing accommodations – e.g., physical barriers, relocating employees
 - If the mandate is likely to cause significant disruptions, reserve rights to seek schedule extension too
- Consider laying groundwork regarding implementation challenges in responding to modifications

EO 14042: Key Employment Law Considerations

- Must take affirmative steps to confirm employee vaccine status
 - Cannot simply provide employees with notice of vaccine requirement
Employees must provide – and contractors must retain – record of vaccination
 - Documentation requirements are flexible (CDC card, printout of medical records, other official documents)
 - Digital records are permitted, but no self-certification without documentation
 - Employees must attest to accuracy of records
 - Immunity from prior infection is not vaccination
- Employers may ask employees about vaccine status
 - Not a HIPAA or ADA violation

EO 14042 and Reasonable Accommodation

- Vaccine mandate is subject to reasonable accommodation obligation for employees who legally entitled to medical or religious exemption
- Medical Exemption
 - Well-established ADA reasonable accommodation process
 - Very few employees will be medically ineligible for vaccination
 - Typical issue will be documented allergy to vaccine components
- Religious Exemption
 - Largely untested and therefore complicated for employers
 - Legal standard is conflict with “sincerely held” religious belief

Best Practices for Contractors

1. Mandate vaccination for all covered employees
 - Provide clear, written communications to employees about mandate
 - Include information about deadlines for vaccine doses
2. Collect vaccination data for covered employees (vaccine cards)
3. Send targeted communications to non-compliant employees
4. Process accommodation requests
5. Evaluate operational impact if required to terminate non-compliant employees
6. Engage in dialogue with Contracting Officer(s) regarding compliance efforts and challenges
7. Delay termination decisions pending further guidance from Contracting Officer(s)
8. Reserve rights to recover added costs and/or obtain schedule extension

Document, Document, Document....Memos to File, Analyses, Correspondence with Contracting Officer(s)

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Best Practices for Contractors –Injunction

- For now, contractors should:
 - Refrain from taking any employment action based solely on EO 14042.
 - Continue to follow the laws (*i.e.*, state and local) remaining in force and be aware that agencies may still require vaccination for contractor employees who will perform on site at federal facilities.
 - Continue to follow corporate policies regarding COVID-19 safety (*e.g.*, encouraging vaccinations, physical distancing, telework policies, etc.).
 - Resist the inclusion of Vaccine Mandate clauses in new prime contract actions.

For more information:



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