



Making Sense of COVID-19 Federal Vaccine Mandates

North Carolina Military Business Center

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Agenda

- What the Federal Mandates Require
- Strategies for Addressing Employee Objections
- Current Status of Federal Vaccine Mandates
- OSHA Guidelines for Large Employers
- Questions

Business Impacted by Mandates

- Businesses needing access to federal facilities
- Federal contractors and subcontractors (Safer Federal Workforce)
- Employers of 100 or more employees (OSHA)
- Medicare/Medicaid certified providers and suppliers (CMS)

Federal Sources for the Mandates

- “Safer Federal Work Force Task Force”
- Federal Contractor / Subcontractor - E.O. 14042 - Task Force Guidance; FAR Clause
- Employers of 100+ employees - Path Out of the Pandemic Memorandum - Emergency Temporary Standard (“ETS”) - Upcoming OSHA standards

Vaccine Mandates Generally

EEOC has said:

- Nothing prevents an employer from requiring the vaccine.
- A vaccination itself is not necessarily a medical examination when administered by the employer or a third party.
- If employer administers, then caution: prescreening vaccination questions may elicit information about a disability; questions must be “job-related and consistent with business necessity.”

As of August 13, 2021, OSHA began recommending that employers require employees to be vaccinated.

E.O. 14042 - Federal Contractors

- January 18, 2022 deadline
- Broad coverage of contractors & subcontractors
- No testing alternative
- May consider legally required accommodations
- Safer Federal Workforce Task Force (Task Force Guidance) - draft guidance and FAQs
- New FAR Clause - FAR 52.223-99

Contracts and Subcontracts Covered

- Services, construction, real property leases
- Services covered under the SCA
- Concessions
- Services for federal employees, their dependents, or the general public in connection with federal property or lands

Contracts and Subcontracts Covered

That were entered into during certain dates:

- Entered into after November 14 for solicitations issued before October 14
- Contracts on new solicitations issued on or after October 15
- Extensions or renewals of contracts awarded on or after October 15
- Options on existing contracts and orders exercised on or after October 15, 2021

Contracts and Subcontracts Excluded

- Federal grants
- Contracts with Indian Tribes
- Employees working outside of the U.S.
- Contracts equal or less than the simplified acquisition threshold (presently \$250,000)
- Subcontracts solely for the provision of products

E.O. 14042 Key Requirements

- **Deadline for Full Vaccination: January 18, 2022**
 - Or, first day of performance on a newly awarded contract
 - All employees should be fully vaccinated or have had an accommodation approved.
- **Covers employees:**
 - Full-time, part-time, temporary, remote.
 - Who work on or in connection with a covered contract.
 - Includes employees who provide support (HR, legal, accounting, billing, etc.).
 - Those in same workplace.

E.O. 14042 Key Requirements

- **Fully vaccinated defined:**
 - 2-weeks after receipt of full course
- **Must require proof**
 - Specific documentation required
- **No testing alternative**
 - Although testing could be condition of an accommodation
- **Must consider “legally required accommodations”**
 - Disability (medical) and Religion

E.O. 14042 Key Requirements

- **Mandatory protocols for masking and social distancing**
 - Required to follow CDC guidance - that may vary with the level of community spread.
 - Need to check CDC tracker on community spread.
- **Must designate a person or persons to coordinate COVID-19 workplace safety efforts**
 - Specific responsibilities for administration, including to visitors.

Vaccine Accommodations - Medical

Disability - the Americans with Disabilities Act

- Use traditional ADA analysis
 - What is a disability?
 - “Direct threat?”
 - Undue hardship?
- Few contraindications to vaccine
- Interactive process with employee

Vaccine Accommodations - Religion

Civil Rights Act of 1964, as amended

- What is religion?
 - Sincerely held religious belief
 - EEOC applies broadly
- Undue hardship

Vaccine Accommodations - Religion

(cont.)

- Most major religions are not opposed to the COVID vaccine.
- An individual may have own personal belief.
- Most common religious objections:
 - Fetal tissue lines used in research
 - Animals used in research
 - Toxic to employee's body

Can an Employer Accommodate?

Case-by-case analysis - Interactive process

- Is there a direct threat or undue harm?
 - Safety of workplace and impact on other employees
- Remote work? Frequent testing? Masking? Social distancing? Leave?
 - Who pays for testing?
- Consider making only temporary accommodations and re-evaluate.

Implementing E.O. 14042

- Communicate with employees
- Publish a written policy
- Clear process for employees to request accommodations - use forms

Implementing E.O. 14042 *(cont.)*

- Confidentiality - Required by ADA
 - HR should handle requests for accommodations
 - No information in personnel files
- Management
 - “Need to know” basis only

Implementing E.O. 14042 *(cont.)*

- Dealing with employees who do not comply (or if accommodation is denied)
 - Discipline? Progressive?
 - Termination?
 - Leave of absence until . . .
- Guidance provides for limited extensions.
- How strict should an employer be?

Injunctions Currently Barring Mandates

- Federal Contractor Mandate - Nationwide Preliminary Injunction by Georgia District Court
- OSHA Mandate - Nationwide Preliminary Injunction by Fifth Circuit Court of Appeals
- CMS Mandate - Preliminary Injunction by Missouri and Louisiana District Court

Current Rulings Are Interim, Not Final

- Injunctions are “Preliminary” and Not Final
 - Nationwide Injunction Appealed 12/9 to Eleventh Circuit
 - Legal Theories Not Clearly Settled
- Courts Have Not Been Consistent
 - Kentucky Federal Court Entered Injunction in Three States
 - Florida Federal Court Denied Injunction Request
- State Laws Re: Vaccines May Apply if there is no Contrary Federal Law

December 9, 2021 OMB Guidance

Agency Rules Where Injunctions are In Effect

- Do Not Enforce FAR Clause Enforcing Vaccine Mandate that Appears in Existing Contracts
- Do Not Insert FAR Clause Enforcing Mandate in Existing Contracts
- Remove Clause Enforcing Mandate From Solicitations
- Masking, Social Distancing in Federal Facilities Still Apply

<https://www.smithlaw.com/resources-publications-1853>

New FAR Clause: FAR 52.223-99

- Contractors must comply with Task Force Guidance, including FAQ.
- Mandatory flowdown to subcontractors above simplified acquisition threshold.
- Flowdown to all tiers.

Takeaways from New FAR Clause

- Clause is in effect for solicitations now through “class deviations”
- “Task Force Guidance” is not fixed; contractors must follow “all guidance . . . as amended during the performance of this contract”
- Expect More Changes as Court Cases Develop

Takeaways from New FAR Clause

- Applies to subcontractors “at any tier”, that are “for services, including construction,” and that “exceed the simplified acquisition threshold [presently \$250,000].”
- Agencies are encouraging contractors to include the FAR clause in all contracts, regardless of size.

Read Your Agency's Class Deviations

- 37 Agencies Have Issued
- NASA Example:
 - Mandate Applies to Micro-Purchases.
 - Requires Bilateral Mod of Existing Contracts
 - Applies to Supplies, R&D, as well as Services.
 - Deadline: October 15, 2021
- <https://www.hq.nasa.gov/office/procurement/regs/pcd/pcd21-03.pdf>

Onsite Contractor Employee Requirements Before a Contractual Vax Requirement

- Agencies will ask onsite employees about their vax status. Those who do not respond under oath are treated as unvaccinated.
- Unvaccinated must provide proof of negative COVID-19 test w/in 3 days of entering a federal building, and must follow masking and social distancing.
- Onsite contractor employees must complete a Certification of Vaccination Form.
- Visitors must follow same requirements unless they are entering a federal building or land to obtain a public service or benefit.
- Agencies required to comply with Privacy Act.

Open Questions / Unresolved Issues

- Can States and Localities have additional vaccine requirements? (Yes, per FAQ)
- Can a State ban federal vaccine mandates? (FAQ says no; courts will decide) (Texas, Florida)
- Supremacy Clause of U.S. Constitution
- 19 States Have Filed Challenges in Four Lawsuits
- Private Company Implementation of Mandate

Open Questions / Unresolved Issues

- Does mandate apply to manufacture of goods? (Not under EO; But See Class Deviations)
- What does “fully vaccinated” mean in the context of booster shots?
- Will bilateral modification of existing contracts be in the future? (See Class Deviations)
- Can contractors seek adjustment for increase costs of compliance?

OSHA and “Reopening America”

- Primary law governing worker safety
- Federal program
- Approved State programs

OSHA and “Reopening America” *(cont.)*

- Standards and rules
- Guidance (including CDC guidance)
- “General Duty Clause”

OSHA “Emergency Testing Standard”

November 5, 2021

- OSHA publishes “Emergency Temporary Standard on Vaccination and Testing”
- Covers employers with 100+ Employees
- Mandates identification of vaccinated employees and masking of unvaccinated by December 5th

OSHA “Emergency Testing Standard”

- Vaccination or testing by January 4, 2022
- Employers covered by Federal Contractor guidelines or Healthcare ETS are exempt from OSHA rules
- Employers must provide support for employee vaccinations

OSHA “Emergency Testing Standard”

- November 12, 2021
 - 5th Circuit Court of Appeals issues Stay, with a December 10 deadline for responses
- November 16, 2021
 - 6th Circuit Court of Appeals chosen to hear consolidated cases
- November 17, 2021
 - OSHA announces it will temporarily suspend ETS enforcement

Employer Considerations in Meantime

- No. 1 - Wait for final decision and risk delayed compliance
- No. 2 - Begin preparing for ETS/Vaccine Only vs Masking Option

Questions for Employers to Consider:

- Who will police negative tests
- Who will evaluate accommodation requests
- Who will collect proof of vaccination

Questions for Employers (*cont.*):

- Who/How will employer maintain documents
- Process for removal of non-compliant employees
- Planning for non-compliant employees

Preparing for Compliance:

- Developing a vaccine policy
- Determining employee vaccination status
- Consider testing costs and procedures

Related Issues:

- Check all local requirements
- Note that effective date in some states may be 30 days later than Federal rules
- Check status of Federal Contractor and Healthcare mandates

Questions?

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