

September 2021

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Vaccinating the Unvaccinated: Executive Order to Require Federal Contractors to Mandate Vaccination

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On September 9, 2021, President Biden announced in a [speech](#) “a new plan to require more Americans to be vaccinated” against COVID-19. In addition to announcing [a plan for all large employers to mandate vaccination or frequent testing](#), President Biden also announced that he would sign an [Executive Order](#) which imposes new and special requirements for federal contractors, regardless of their size. This Executive Order comes on the heels of President Biden’s July 29 [announcement](#) that onsite federal contractors’ employees must certify they are vaccinated against COVID-19 or wear a mask at all times and be subject to regular testing. As White House Press Secretary Jen Psaki [put it](#), “if you want to work in the federal government or be a contractor, you need to be vaccinated, unless you are eligible for one of the exemptions.”

What Are the Requirements of the Executive Order?

The Executive Order requires the Safer Federal Workforce Task Force (the “Task Force”)—which President Biden established in January to give heads of federal agencies guidance during the pandemic—to issue guidance (“Guidance” or “Task Force Guidance”) for contractor or subcontractor workplace locations, including “definitions of relevant terms for contractors and subcontractors, explanations of protocols required of contractors and subcontractors to comply with workplace safety guidance, and any exceptions.”

When Will the Guidance Be Issued?

The Task Force must issue the Guidance by September 24, 2021.

When Will Contracts Need to Include the Clause Requiring Compliance with the Guidance?

By October 8, 2021, federal agencies must “take steps” to include a clause in most contracts requiring the contractor to comply with the guidance. Covered contracts entered into on or after October 15, 2021, except solicitations issued by agencies before October 15 that result in new contracts within 30 days of that date, must include a provision requiring compliance with Task Force Guidance.

Which Government Contracts Will Be Affected?

Covered contracts include:

- Procurement contracts for services, construction, or a leasehold interest in real property;
- Contracts for services covered by the Service Contract Act, 41 U.S.C. 6701 et seq.;
- Contracts for concessions, including concessions contracts excluded by Department of Labor regulations at 29 C.F.R. 4.133(b); and
- Contracts with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

The Executive Order exempts the following types of contracts from the requirement that they contain such a clause:

- Grants;
- Contracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended;
- Contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold, as that term is defined in section 2.101 of the Federal Acquisition Regulation (currently \$250,000);
- Employees who perform work outside the United States or its outlying areas, as those terms are defined in section 2.101 of the Federal Acquisition Regulation; and
- Subcontracts solely for the provision of products.

What Legal Challenges Might Arise?

Legal challenges to the Executive Order are likely to focus on whether the mandate falls within the scope of the Procurement Act's purposes—to promote economy and efficiency in procurement.

Next Steps

As federal contractors await guidance from the Task Force on September 24, 2021 and resolution of any anticipated legal challenges, they would be well-advised to take steps *now* to develop their own action plans on how to navigate the legal and practical issues related to required vaccination and testing. Issues to consider include the implementation of new policies, vaccination and testing tracking, proof protocols and management, medical and religious exemptions to the extent they apply, employee pay obligations, time-off requests, potential bargaining obligations for unionized workplaces, recordkeeping requirements, employee privacy, and discipline.

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