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Recent Executive Orders Require Government Contractors to Confront Vaccine Issues Head-On

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Government contractors are no stranger to various regulatory requirements and two recent Executive Orders will require most contractors to comply with mandatory COVID-19 vaccination requirements. Last week, President Joe Biden announced a series of proposals, and issued two Executive Orders, aimed at combating rising COVID-19 infections following the emergence of the virus's "Delta variant" in recent months.

As part of this rollout, one Executive Order asked the Department of Labor to issue a regulation requiring companies with 100 or more employees to ensure their workforces are either fully-vaccinated or provide a weekly negative COVID test result. The Occupational Safety and Health Administration ("OSHA") is responsible for drafting and implementing this emergency regulation and believes it will apply to more than 80 million private-sector workers—including government contractors. The president also directed OSHA to require businesses subject to the rule to give workers paid time off to get vaccinated and to recover from any side effects. While it is not yet certain what will make its way into the final draft of this emergency regulation, OSHA could use its considerable enforcement powers to fine noncomplying businesses up to $14,000.00 per violation.

Litigation should be expected regarding the proposed regulation as it is not clear whether OSHA or the White House will be able meet the legal burdens required for such a unique incursion into the private sector.

President Biden also issued an Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors. This Executive Order is also broad in its reach and will cover contractor locations on federal facilities and beyond. It is separate and in addition to the proposed OSHA "vaccine mandate" rule discussed above.

The Executive Order states that the vaccine mandate is applicable to any contract or contract-like instrument that is entered into, extended, renewed, or has an option exercised on or after October 15, 2021. However, the Executive Order is effective immediately and agencies are "strongly encouraged, to the extent permitted by law," to extend the vaccine mandate to existing contracts not otherwise subject to the Executive Order. The Executive Order directs the Safer Federal Workforce Task Force ("Task Force") to issue guidance by September 24, 2021, outlining "definitions of relevant terms," "explanations of protocols required of contractors and subcontractors," and "any exceptions" to the vaccination mandate.

The Executive Order will "apply to any workplace locations" (as specified by the Task Force Guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument. The "on or in connection with" standard is borrowed from the federal contractor minimum wage requirement. Employees perform services "on" a contract when they perform the work required by

the contract, and perform “in connection with” a federal contract when they perform services that are not required by the contract, but are necessary to the performance of the contract’s services, such as custodial, security, or maintenance services at facilities that perform both commercial and government work. The Executive Order applies to “any workplace locations...in which an individual is working on or in connection” with a contract. On its face, the Executive Order would apply the vaccine mandate to full-time remote workers who do not interact in-person with any other co-workers.

Additionally, the Executive Order provides that executive departments and agencies must ensure that “contracts and contract-like instruments” include a clause that the contractor and any subcontractors (at any tier) must incorporate into lower-tier subcontracts. It further provides that this clause must specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations.

Finally, the Executive Order lists exceptions to situations where it does not apply. Section 5 of the order states that it does not apply to: (1) Grants; (2) Contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended; (3) Contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold; (4) Employees who perform work outside the United States or its outlying areas; or (5) Subcontracts solely for the provision of products.

Worth noting, the Executive Order is ambiguous about several important issues. For example, since the Executive Order is phrased to apply to “any workplace locations” where contract work is performed, rather than to employees performing the work, the mandate may also cover workers performing only commercial work if there is also government contract work performed at the employee’s “workplace location,” which is itself a potentially ambiguous term. We are hopeful that the Tasks Force’s upcoming guidance will answer these questions. These Executive Orders require government contractors and other businesses to address vaccination issues head-on. Contractors should understand the impact of these requirements to their organization and craft a plan to comply. Our COVID-19 Task Force can help your organization understand the impact of these new requirements on your organization.