

Federal Contractor Vaccine Mandate Uncertainty: Where the Mandate Stands and Current Considerations for Contractors and Subcontractors

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The federal contractor vaccine rollout continues to present thorny issues for federal contractors. President Biden issued Executive Order (“E.O.”) 14042 in early September 2021, requiring federal contractor employees to get vaccinated against COVID-19. The E.O. was followed by guidance issued by the Safer Federal Workforce Task Force (“Task Force”) in late September 2021, which has been frequently updated in the months since.

As described more fully in [our prior post](#), under the mandate, implemented through the Task Force guidance incorporated into clauses issued by federal agencies, vaccines are mandatory for federal contractor employees working on covered contracts, those who perform duties in connection with a covered contract, and those working at the same workplace as covered employees. Contractors must also comply with masking and physical distancing requirements. The mandate applies to subcontractors at any tier, and applies to contractors of all sizes -- small, medium or large. The E.O. and Task Force guidance immediately gave rise to many compliance questions and concerns over impact on contract or subcontract performance. Legal challenges to the contractor vaccine requirement and actions by numerous states have further complicated an already difficult compliance landscape.

The States of Arizona, Florida, Alabama, Idaho, Kansas, South Carolina, Utah, West Virginia, Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, Wyoming, Texas, Louisiana, Indiana, Mississippi, Kentucky, Ohio, and Tennessee filed suit in federal District Courts across the country challenging the mandate. Generally, these cases challenge the mandate on procedural grounds, such as alleging violation of the Administrative Procedure Act’s notice and comment requirements for rulemaking and that the federal government’s actions were arbitrary and capricious. Other arguments include that the mandate is unconstitutional based on violation of the Separation of Powers and that the mandate unconstitutionally exercises a legislative power given exclusively to Congress and by exceeding the President’s authority under the Federal Property and Administrative Services Act and based on violation of the Tenth Amendment, which holds that powers not delegated by the Constitution to the United States or prohibited by it to the states are reserved to the states.

On November 30, 2021, the U.S. District Court for the Eastern District of Kentucky issued a

preliminary injunction, enjoining enforcement of the vaccine mandate in Kentucky, Ohio, and Tennessee. Soon afterwards, on December 7th the U.S. District Court for the Southern District of Georgia issued a nationwide injunction on the contractor vaccine mandate for all covered contracts in any state or territory in the United States. The United States filed emergency motions for stay pending appeal on December 3rd in the Kentucky litigation and on December 9th in the Georgia litigation. On December 10th, the Kentucky district court denied the government's motion for an emergency stay, concluding that the factors the court was required to consider in adjudicating a motion for stay pending appeal did not weigh in the government's favor. The United States has appealed the district court orders in Kentucky and Georgia on December 6th and 10th, respectively, to the Sixth and Eleventh Circuit Courts. These District Court injunctions have not permanently declared the mandate illegal or unconstitutional but have stopped enforcement for the time being.

The Safer Federal Task Force, on December 9th, announced that the Government would take no action to enforce the clause implementing E.O. 14042, subject to a court order prohibiting application of the requirements. Because the Georgia preliminary injunction has nationwide applicability, the Government has effectively agreed not to enforce compliance of the COVID-19 vaccine requirement while that injunction is still in place. If the Georgia preliminary injunction were to be struck down on appeal, there may still be some uncertainty created, depending on the government's position on enforcement in states that do not have a limiting court order.

GSA has also announced that its contracting officers shall not take any action to enforce the vaccination requirements in FAR 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, in any contract or contract-like instrument. GSA's website states: "Contractor and subcontractor employees do not have to meet the vaccination mandate in the Safer Federal Workforce Task Force Guidance." See <https://www.gsa.gov/governmentwide-initiatives/emergency-response/covid19-coronavirus>. In addition, contractors will continue to be eligible for new contracts, new orders, options, and extensions even if they have not agreed to follow FAR clause 52.223-99.

Similarly, the Department of Defense issued a memorandum stating that its contracting officers shall not enforce DoD's clause 252.223-7999, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors. Contracting officers are instructed not to include that clause in new solicitations and shall not enforce the requirements of the clause in existing contracts, task orders, and delivery orders. In addition, DoD contracting officers shall not include this class deviation clause in new contracts or orders and shall not amend existing contracts or orders to incorporate the clause.

The Office of Management and Budget ("OMB") has issued similar guidance, stating that for existing contracts implementing the requirements of E.O. 14042, agencies must notify contractors of the new Task Force guidance providing that the Government shall take no action to enforce implementation of the clause subject to court orders. For existing contracts that do not contain a COVID safety protocols clause, agencies will still move forward with issuing bilateral modifications when exercising an option, issuing a new order under the contract, or extending the term of the contract, and must inform the contractor of the Government's enforcement position when requesting that a contractor agree to the addition of the clause. With regard to solicitations for new orders to be issued under existing IDIQ contracts that do not contain a clause that implements requirements of Executive Order 14042, the agency must include the clause and a provision summarizing the Government's enforcement position. OMB's Guidance makes clear that apart from application of requirements pursuant to E.O. 14042, there are no changes to the Task Force's guidance for COVID-19 workplace safety protocols for federal agencies. Workplace safety protocols still apply to federal buildings and federally controlled facilities, and contractor employees working onsite in those locations must still

comply with those rules.

While the fate of these injunctions and their duration have yet to be decided, contractors face many compliance challenges. For contractors with covered contractor employees and covered workplace locations in multiple jurisdictions, the injunctions issued by different states gives rise to increased burdens for tracking and monitoring requirements, particularly if the nationwide injunction is struck down, but partial injunctions are made permanent.

Making matters more complicated is that state legislation in some jurisdictions seeks to limit an employer's ability to take disciplinary action against employees that refuse to get vaccinated. In Florida, for instance, the state legislature passed a new law in November banning private employers from requiring COVID-19 vaccines, unless various exemptions are offered. Florida Statute § 381.00317 creates risks for federal contractors in Florida attempting to comply with both the federal contractor vaccine mandate and the state's new law.

While the challenges to the federal contractor vaccine mandate continue to make their way through the courts, contractors should consider taking the following steps in the interim to best prepare themselves for possible outcomes of the litigation:

1. Monitor federal, state, and municipal COVID-19 vaccine requirements and safety protocols to determine relevant workforce and facility mandates applicable to employees in all jurisdictions. This includes tracking the status of legal challenges to determine the scope and validity of requirements and required contractual actions.
2. Implement the safety protocols for federal covered contractor workplaces, including masking and physical distancing requirements, set forth in the Task Force's Guidance on its website. Georgia's and Kentucky's preliminary injunctions address the vaccine mandate, not other precautions required by the Task Force guidance, which remain valid.
3. Implement a system for tracking contractor employee vaccine status to monitor employees that work on covered contracts and verify whether they have been vaccinated. Refrain from adverse employment actions with regard to vaccine hesitant individuals in the workforce until the Kentucky and Georgia cases have been fully adjudicated.
4. While taking steps to implement Task Force Guidance, consider addressing modifications to existing contracts incorporating FAR Deviation clauses by including a reservation of rights subject to limitations imposed by court orders or communicate with agency contracting officers to determine whether they holding modifications until legal challenges to the vaccine mandate have been finally adjudicated.
5. Diagnose whether individual state and local rules governing vaccines conflict with the federal contractor mandate with respect to individual employees and assess the relative risk of enforcement of federal versus state/local rules.