



Executive Orders To Mandate COVID Vaccines Across Federal and Government Contractor Workforce as Part of President's Sweeping Pandemic Plan

By: Anthony H. Anikeeff

09.10.2021

As part of a much broader proposed six-part **Path out of the Pandemic**, the President issued two Executive Orders on September 9, 2021 that continue the Administration's efforts to expand COVID-19 vaccinations throughout the United States using its employment authority regarding its employees and regulatory authority regarding the hundreds of thousands of entities desiring to do business with the Government.

Federal Employees

The **Executive Order** "Requiring Coronavirus Disease 2019 Vaccination for Federal Employees" is short and to the point. It requires each Federal agency to implement a program to require COVID-19 vaccinations for all of its employees, with exceptions only as required by law (e.g., which could potentially be medical and religious reasons). It also requires The Safer Federal Workforce Task Force (established by Executive Order 13991 of January 20, 2021) (Task Force) to issue guidance within 7 days regarding agency implementation of the vaccination requirement. The Order eliminates the exception under the prior Federal vaccination mandate for federal employees (and contractors), which had allowed them to opt out if they wore masks, socially distanced and were tested for COVID at least weekly. As a practical matter, the Order is expected to require around 2.1 million Federal workers to be vaccinated within a relatively short period of time or face increasing discipline within agency guidelines.

Federal Contractors and Subcontractors

The **Executive Order** "Ensuring Adequate COVID Safety Protocols for Federal Contractors" is less direct, but is equally intended to ensure that Federal contractors and all their subcontractors require vaccinations of their employees unless exempted by law. At its core, the Order requires Federal

agencies to ensure contractors comply with guidance to be issued by the Task Force (once approved by the Office of Management and Budget (OMB) for the duration of any contract or subcontract at any U.S. workplace location where an individual is working on or in connection with a Federal Government contract or contract-like instrument. The Task Force guidance regarding protocols to be followed by contractors and subcontractors, subject to OMB approval, is to be developed by September 24, 2021. It is expected that the Task Force guidance will require that all employees not subject to an exemption be vaccinated. Contractors will be required to follow the Task Force guidance, subject to their being required to comply with any more protective state or municipal safety protocols or with more protective Federal law, regulation, or agency instructions for contractor or subcontractor employees working at a Federal building or federally controlled workplace. Like with federal employees, we assume, subject to further guidance from the various federal agencies, that some employees will potentially not be subject to the vaccination requirement under the reasonable accommodation requirements of the Americans with Disabilities Act and the Rehabilitation Act or due to sincerely held religious beliefs under Title VII of the Civil Rights Act of 1964.

The Order directs that the term "contract or contract-like instrument" be interpreted broadly to cover an agreement covered by any procurements statute, which extends its reach beyond the agreements covered by the Federal Acquisition Regulation to most types of agreements entered between the Government and a private entity. Although not specifically identified, it appears more likely than not that the Order will cover Other Transaction Authority agreements. Additionally, the definition of a contract will cover all associated subcontracts and subagreements at any level.

The Order acknowledges that it generally is forward looking to new contracts and contract-like instruments; new solicitations; extensions or renewals of an existing contract or contract-like instrument; and the exercise of an option on an existing contract or contract-like instrument. It directs the FAR Council to expeditiously amend the FAR to add a clause to procurement solicitations and contracts implementing the Order's dictates *i.e.*, mandating the vaccine guidance issued by the Task Force. For FAR covered agreements, the Order encourages agencies to use their Deviation authority (FAR Subpart 1.4) to expedite the implementation process. For other agreements not covered by the FAR, the Order directs agencies by October 8, 2021 to exercise applicable authority to include a clause directing compliance with the Task Force guidance be included in any contract or contract-like instrument entered after October 15, 2021. The Order notes that for agreements that may precede the effective dates in some regard, agencies are "strongly encouraged" to ensure that the safety protocols are applied to them, in accordance with the law.

The Order is not all encompassing. Besides exempting persons under other laws, it does not apply to subcontracts providing only products, to agreements below the simplified acquisition threshold (\$250,000 or otherwise), to grants and to employees who work outside the United States and outlying areas.

Other Aspects of President's Plan May Affect Contractors

In addition to the effects of these two orders, contractors also may be affected by other parts of the President's Plan which include: (a) an expected Department of Labor, Office of Safety Health administration emergency regulation requiring "all employers with 100 or more employees to ensure

their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work,? and (b) action by the Centers for Medicare & Medicaid Services (CMS) to require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement.

We are following and will report on developments. That said, until the Task Force has issued its guidance and the FAR Council or respective agencies issue implementing clauses or other directives, employers would be well-advised to (i) assess whether they are an existing or prospective contractor or subcontractor (at any tier) and (ii) determine whether they have (a) a pending new award, extension or option for a contract or (b) a contract-like instrument or subcontract that exceeds the simplified acquisition threshold and is being performed within the United States or its outlying areas.

For more information, please contact Tony Anikeeff, Laura Windsor, David Burton, or Bob Korroch.

Related People

- Anthony H. Anikeeff ? 703.760.5206 ? aanikeeff@williamsmullen.com
- David C. Burton ? 757.473.5354 ? dburton@williamsmullen.com
- Laura D. Windsor ? 804.420.6466 ? lwindsor@williamsmullen.com

Related Services

- Government Contracts
- Labor, Employment & Immigration