

***CLIENT ALERT:*****Large Employer and Federal Contractor Vaccine Mandates**

By Gregory Paal

*September 2021*

The Biden Administration is taking aggressive action to pull as many American workers as possible into a vaccination-or-testing regime to address the ongoing COVID-19 pandemic. The White House recently released a [multi-pronged plan](#) that utilizes the federal government's contracting and regulatory powers to increase the number of fully vaccinated Americans and to require covered unvaccinated workers to produce a negative COVID test at least once a week.

President Biden issued an [Executive Order](#) (E.O.) to initiate the process of imposing a vaccine mandate on federal contractors that will be effective October 15, 2021. On September 24, 2021, the Safer Federal Workforce Task Force (Task Force) will publish a mandatory clause that will be included in covered contracts with the federal government. Starting on October 15, federal contracts and contract-like instruments that exceed the current federal simplified acquisition threshold (currently set at \$250,000) will include a clause mandating employees and subcontractors of federal contractors be vaccinated subject to limited exemptions as allowed by law.

The President has also directed the OSHA to develop an Emergency Temporary Standard

(ETS) that would require all employers with 100 or more employees to ensure that their employees are either fully vaccinated or tested once a week for COVID-19.

**Federal Contractor Mandate**

President Biden's [September 9<sup>th</sup> E.O.](#) establishes a timeline for the creation and adoption of a contractual clause, to be included in all covered contracts entered into by federal agencies on or after October 15<sup>th</sup>, that will require federal contractors and subcontractors to be vaccinated against COVID-19. The planned timeline is:

- **September 9, 2021:** E.O. is signed
- **September 24, 2021:** Safer Federal Workforce Task Force provides guidance on the mandate clause to be incorporated into future federal contracts, including definitions, explanations of protocols, and exceptions to the requirements
- **October 8, 2021:** Agencies begin implementing the E.O. to ensure that the October 15 deadline for the use of the mandate clause is met
- **October 15, 2021:** All covered contracts agreed to, renewed, or

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extended after this date include the clause

After October 15<sup>th</sup>, all covered contracts will include a clause requiring contractors and subcontractors to comply with all guidance published by the Task Force for the duration of the contract. The Task Force's guidance will include a vaccine mandate after September 24<sup>th</sup>. The E.O. further requires federal contractors and subcontractors to incorporate the clause into lower-tier contracts with subcontractors working pursuant to the underlying federal contract.

*Covered Contracts:* Contracts are covered if they fall within the meaning of "contract or contract-like instrument" established in the DOL rule setting minimum wage for federal contractors. 86 Fed. Reg. 38816, 38887. The definition for "contract or contract-like instrument" in the DOL rule is defined broadly to include:

"[A]ll contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. "

*Exclusions:* The E.O. excludes contracts and subcontracts that do not exceed the [federal simplified acquisition threshold](#) (currently \$250,000 across the life of the contract). The E.O. also excludes subcontracts solely for the provision of products, meaning that contractors do not have to ensure that subcontracts with product suppliers include the mandated clause. The E.O. further excludes grants, employees who work outside of the United States, and agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act.

**Large Employer Mandate:**

President Biden has also ordered OSHA to develop an Emergency Temporary Standard (ETS) that will require all employers with 100 or more employees to ensure that their employees are either vaccinated or can produce a negative COVID-19 test on a weekly basis. Under [29 U.S.C. § 655\(c\)\(1\)-\(3\)](#), OSHA may issue an ETS when the Secretary of Labor determines that employees are "exposed to grave danger . . . from new hazards" and the ETS "is necessary to protect employees from such danger. The ETS becomes effective immediately upon its publication in the Federal Register. Assuming the Large Employer ETS follows the pattern set by previous OSHA rules, employers will have between 14 and 30 days to come into compliance with the various provisions of the ETS, after which OSHA

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may begin issuing penalties for noncompliance. If OSHA characterizes a violation as Serious, it may impose a penalty of up to **\$13,653 per violation**. If the violation is characterized as Willful or Repeated, OSHA may impose a penalty of up to \$136,532 per violation. Importantly, OSHA has stated that it will use its discretion to not penalize employers who are attempting in good faith to comply with the new ETS.

It is unclear what the timeline is for the Large Employer ETS, but OSHA is expected to promulgate it in the near future. The ETS will inevitably face legal challenges immediately and may be halted by an injunction before enforcement begins. Nevertheless, employers of 100 or more employees should be prepared to comply with the provisions of the Large Employer ETS as it phases in over the coming weeks.

*Exemptions:* [The White House has stated](#) that the various vaccine mandates will only allow exemptions as required by law. An employee could claim a religious exemption if taking the vaccine violates a sincerely held religious belief under Title VII of the Civil Rights Act. An employee who claims that a disability prevents them from taking the vaccine may be protected by the Americans with Disabilities Act. In both cases, an employer would be obligated to try to determine whether a reasonable accommodation would allow the employee to continue working for

the employer without causing the employer undue hardship.

*Looking Ahead:* The Task Force guidance will shed more light on the scope of the mandate, how the federal government measures compliance, and the enforcement mechanisms the government will employ when it is published on or before September 24, 2021. While the clause will not be mandatory until October 15, 2021, the Executive Order explicitly encourages agencies to incorporate into new contracts as soon as practicable once the clause is published. It is therefore advisable that businesses with existing federal contracts or those seeking a federal contract in the immediate future prepare to comply with the mandate as soon as possible.

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