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NOTES FROM OCTOBER 29, 2021 WEBINAR

OSHA'S COVID-19 VACCINATION EMERGENCY TEMPORARY STANDARDS ("ETS")

Contrary to our expectations, Federal OSHA has yet to publish its ETS addressing COVID-19 vaccinations for private employers. Once finalized, the ETS will be published in the Federal Register (thereby making it official law of the land). We expect publication of the ETS in the Federal Register approximately between November 5-10, 2021. Once the ETS is published in the Federal Register, State OSHA Plans will have 15 days to announce either their adoption of the ETS or announce an alternative to the ETS, at which point State OSHA Plans will have another 15 days to make the ETS (or their own alternative) effective. We anticipate December 15 to be the date where enforcement of the ETS will begin after some limited grace period for compliance lapses. In terms of State enforcement, we are anticipating that that may begin sometime around January 1, 2022.

Federal OSHA Plans v. State OSHA Plans

Federal OSHA does not have jurisdiction over every private employer in the country. The Federal Government can largely enforce safety rules against private employers only in 29 states plus the District of Columbia and other American territories (subject to exceptions like federal worksites/military bases/navigable waters in other states).

The other 21 states have approved "state plans," where a state agency enforces safety regulations in that jurisdiction. Adding to the confusion, six federal states and territories also have state plans that cover only local and state government workers.

Federal OSHA States: Alabama, American Samoa, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, Idaho, Illinois, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Virgin Islands, West Virginia, and Wisconsin.

State OSHA States (private and local and state government): Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

Once published in the Federal Register, the ETS will become effective immediately in Federal OSHA states. There will be about 15-30 days before the ETS (or some variation or alternative) of the ETS) takes effect for State OSHA states.

What Should Businesses Be Doing Now to Prepare for the ETS

It's expected that the ETS will mirror the safety protocols for federal contractors set forth in [Executive Order 14042](#) and to provide guidance similar to the [EEOC's guidance on employer obligations to provide reasonable medical and religious accommodations](#).

Covered employers should start taking steps now to prepare for, and ensure compliance with, the impending mandatory vaccine and testing rules.

Proactive steps covered employers can take in anticipation of the ETS include:

- Survey current employees to determine what percentage of your workforce is already vaccinated. This will help inform your decision on whether to implement a mandatory vaccine policy for all or to allow employees the option of weekly testing.
- Look into the cost and availability of weekly testing to determine if permitting employees to get tested weekly rather than mandating vaccination for all financially and physically feasible. Covered employers should consider whether they could afford to do so if employers are ultimately required to pay for weekly testing.
 - For states with laws requiring employers to cover all business-related expenses or employer-mandated testing, you may not be able to require an employee who refuses vaccination to cover the cost of their own testing.
- Consider whether employees will require time off to get vaccinated or tested weekly. Biden's Action Plan signals a pending requirement that employers provide paid time off for employees to become vaccinated and recover from any vaccination-related side effects. This is already a requirement in the OSHA ETS regarding healthcare employers.
 - Employers may be able to require the use of PTO, but until further guidance is issued on this topic, employers should assume that additional PTO may be necessary for employees.
- Employers offering weekly testing as an alternative to vaccination should also consider whether employees will need time off work to get tested and if so, whether such employees will be paid for the time it takes to test, which would likely be compensable working time.
- Consider how your policy will apply to remote workers. If an employee is never physically present in the workplace or never comes in contact with other employees during work, they may still be required to get vaccinated like everyone else absent an approved accommodation.
- Draft a written policy based on your intended method to comply with the ETS. It should contain your process for:
 - documentation for proof of vaccination and/or weekly testing,
 - deadlines for submitting the required documentation,
 - procedure for requesting religious and disability accommodations.
- Determine if you are a Federal or State OSHA Plan state.
- Plan to train your employees on COVID-19 policies and procedures (train managers and supervisors on what to do/say if you do get a visit).

EEOC Updates the Guidance on Religious Accommodations

This week, the EEOC issued [updated guidance](#) on religious accommodation for an exception to an employer's COVID-19 vaccination requirement. Below are some of the key updates to the EEOC's guidance:

1. Employee must speak up and tell their employer they cannot be vaccinated because of their religious beliefs.
2. The guidance provides that there are no "magic words" the employee needs to use, such as "I need a religious accommodation" or "I demand my rights under Title VII."
3. The guidance states that as a best practice, the employer should tell employees who they should contact to request a religious accommodation.

Verifying the Religious Request

The guidance provides that an employer generally should assume that a request for religious accommodation is based on sincerely held religious beliefs. However, the guidance allows an employer to make a limited factual inquiry and to seek additional supporting information if an objective basis exists for questioning either the religious nature or the sincerity of a particular belief. The guidance also explains that non-traditional religious beliefs are also protected, even if such beliefs may be unfamiliar to employers. However, an employer may ask employees to explain the religious nature of their belief.

Importantly, the guidance makes clear that Title VII does not protect social, political or economic views, or personal preferences, and therefore, objections to COVID-19 vaccination based on "social, political, or personal preferences, or on nonreligious concerns about the possible effects of the vaccine, do not qualify as 'religious beliefs' under Title VII."

The guidance also instructs that the sincerity of an employee's religious beliefs usually is not in dispute, but may be challenged based on factors that undermine an employee's "credibility." The guidance suggests that the following considerations may undermine the credibility of an employee's sincerity:

- Whether the employee recently has acted inconsistently with the professed belief (although employees need not be scrupulous in their observance);
- Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for non-religious reasons;
- Whether the timing of the request renders it suspect (e.g., when it follows an earlier request by the same employee for the same benefit for secular reasons); and
- Whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

The Guidance also cautions that no one factor or consideration is determinative, and employers should evaluate religious objections on an individual basis.

Determining Undue Hardship on The Employer

“Undue hardship” requires more than a showing of minimal cost or inconvenience to the employer. The guidance provides that costs to consider include the burden on and risk to the employer’s business – including, in this instance, the risk of the spread of COVID-19 to other employees, as well as direct monetary costs to the employer. Undue hardship has been upheld where the religious accommodation would impair workplace safety, diminish efficiency in other jobs, or cause coworkers to carry the accommodated employee’s share of potentially hazardous or burdensome work.

When determining undue hardship, the guidance explains that employers must consider the particular facts of each situation and must show how much cost or disruption the employee’s proposed accommodation would involve. Employers must rely on “objective information” and not on “speculative hardships.” The guidance provides examples for consideration, such as:

- Whether the employee requesting a religious accommodation to a COVID-19 vaccination requirement works outdoors or indoors;
- Whether the employee works in a solitary or group work setting, or has close contact with other employees or members of the public;
- Whether the employee is exposed to medically vulnerable individuals; and
- The number of employees who are seeking a similar accommodation (i.e., the cumulative cost or burden on the employer).

Finally, the guidance instructs that an employer consider all possible alternatives to determine whether exempting an employee from a vaccination requirement would impose an undue hardship. Employers may rely on recommendations by the Centers for Disease Control and Prevention (“CDC”) when deciding whether an effective accommodation is available that would not pose an undue hardship. Such examples may include remote work, testing as recommended by local, state or federal agencies, masks, social distancing, work reassignment, schedule changes, and changes to the physical work environment.

In considering virus testing options, the guidance does not address who pays for the test itself or whether the time spent to get tested is compensable. For these issues, employers should consult with legal counsel regarding local, state, and federal wage and hour laws and other laws that likely apply. For example, in some circumstances, the U.S. Department of Labor’s guidance on the Fair Labor Standards Act suggests that employers must pay for all time spent undergoing tests that the employer requires.

Choosing The Reasonable Accommodation

The guidance makes clear that the employer does not necessarily need to choose the employee’s requested accommodation if other reasonable accommodations exist. However, the employer should explain to the employee why the requested accommodation is not being granted.

THE FEDERAL CONTRACTOR MANDATE

As we know, President Biden signed [Executive Order 14042](#) (the “Order”), which requires certain covered contractors to mandate COVID-19 vaccinations for their covered workforce, among other requirements (“Federal Contractor Mandate”). Pursuant to the [Safer Federal Workforce Task Force’s “COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors”](#) (the “Guidance”), which further delineates the Order’s requirements, covered contractors must ensure that all covered contractor employees (except those who are legally entitled to an accommodation) are fully vaccinated by December 8, 2021.

Who Must Comply with the Federal Contractor Mandate?

Given the gravity of this action, many businesses are left wondering whether they must comply with the Order. Below is a walkthrough that explains exactly who and which contracts are subject to these new requirements.

1. Who Counts as a “Covered Contractor?”

According to the Guidance, a “covered contractor” means a prime or subcontractor at any tier who is a party to a covered contract, regardless of the size of their business. A “covered contract” means any contract or contract-like instrument (defined below) that includes a clause that specifies that the contractor (or subcontractor) shall, for the duration of the contract, comply with all guidance for contractor (or subcontractor) workplace locations published by the Safer Federal Workforce Task Force (“Task Force Clause”). Contracts that do not include this clause are not covered contracts.

Because no existing federal contracts likely contain the Task Force Clause, both the Order and the Guidance outline phase-in requirements for when Task Force Clause must be incorporated into certain contracts:

- *Contracts awarded prior to October 15, 2021, where performance is ongoing* – the Task Force Clause must be incorporated at the point at which an option is exercised or an extension is made.
- *New contracts* – the Task Force Clause must be incorporated into contracts awarded on or after November 14, 2021. Between October 15 and November 14, agencies must include the clause in the solicitation and are encouraged to include the Task Force Clause in contracts awarded during this time period but are not required to do so unless the solicitation for such contract was issued on or after October 15.

Once the Task Force Clause is in the contract, the contract becomes a “covered contract” and makes the contractor a “covered contractor.”

2. What Types of Contracts Are Subject to These New Requirements?

The Order and Guidance’s requirements apply only to parties and individuals who are working on or in connection with a Federal Government “contract or contract-like instrument.” Pursuant

to the Guidance, a “contract or contract-like instrument” has the meaning set forth in the [Department of Labor’s proposed rule, “Increasing the Minimum Wage for Federal Contractors,” 86 Fed. Reg. 38,816, 38,887 \(July 22, 2021\)](#).¹ There, a “contract or contract-like instrument” means an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. The term “contract” is interpreted broadly to include, but not be limited to, any contract within the definition provided in the [Federal Acquisition Regulation](#).

This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The term “contract” includes all 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; and
- Any contract that may be covered under any Federal procurement statute.

Such contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. In addition to bilateral instruments, “contracts” include, but are not limited to:

- Awards and notices of awards;
- Job orders or task letters issued under basic ordering agreements;
- Letter contracts;
- Orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance;
- Exercised contract options; and
- Bilateral contract modifications.

The term “contract” also includes contracts covered by the Service Contract Act, contracts covered by the Davis-Bacon Act, concessions contracts not otherwise subject to the Service Contract Act, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public.

¹ Because the Guidance’s definition of “contract or contract-like instrument” comes from a proposed rule, which is still subject to change, the Guidance expressly states that the definition will have the meaning set forth in the final rule if the Department of Labor issues a final rule.

3. What Types of Contracts are Not Subject to the New Requirements?

While the term “contract or contract-like instrument” is meant to be construed broadly, there are certain contracts that are not subject to the Order and Guidance’s requirements. These include:

- Grants;
- Contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold, as that term is defined in the Federal Acquisition Regulation (\$250,000);
- Subcontracts solely for the provision of products; and
- Contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act.

While contracts whose value is equal to or less than \$250,000 are not subject to these new requirements, the Guidance does state that agencies are strongly encouraged to incorporate the Task Force Clause into contracts that do not meet this threshold.

Businesses are encouraged to consult with legal counsel to determine whether they are required to comply with these new requirements. Because existing contracts with the Federal Government likely do not contain the Task Force Clause, businesses should be prepared to implement the Order and Guidance’s requirements as soon as the Task Force Clause is included in their contract at the time the contract is extended or its option is exercised, as the case may be, and should ensure they flow down the Task Force Clause to their subcontracts.

What Must Businesses Do To Comply with the Federal Contractor Mandate?

Once you’ve determined that you’re a business subject to the Federal Contractor Mandate, there are four main compliance components:

- Vaccinations
- Masking/Social Distancing
- Designating a Person/Persons to Coordinate Workplace Safety Efforts
- Verification that Subcontractors are Complying with the Mandate

Each of those components are addressed below.

1. Vaccinations.

“Covered contractors” must ensure that all “covered contractor employees” (except those legally entitled to an accommodation) are [fully vaccinated](#) by December 8, 2021. After that date, all covered contractor employees must be fully vaccinated by the first day of performance on the covered contract.

A “covered contractor employee” is any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace

(regardless of whether they're working on or in connection with a covered contract). Employees who perform duties necessary to the performance of the covered contract, but who are not directly engaged in performing the specific work called for by the covered contract, such as human resources, billing, and legal review, perform work in connection with a covered contract. A "covered contractor workplace" is a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract.

While the term "covered contractor workplace" does not include an employee's residence (in the case of remote workers), employees working from home whose work includes working on a covered contract from their residence must get vaccinated in accordance with the Federal Contractor Mandate, even if the employee never works at either a covered contractor workplace or a Federal workplace.

The Guidance also addresses instances where covered contractor employees have had prior COVID-19 infections. In such instances, covered contractor employees must still get vaccinated, and antibody tests will not be considered a permissible substitute for the vaccination requirement.

In terms of ensuring covered contractor employees are vaccinated, covered contractors are not required to provide on-site vaccinations. However, they are required to make employees aware of convenient opportunities to get vaccinated (i.e., provide employees with information on where they can get vaccinated).

Finally, the Guidance outlines what type of documentation is acceptable for proving vaccination status. The Guidance states that covered contractors must review covered contractor employees' documentation to prove vaccination status. Acceptable vaccination documentation includes:

- A copy of the record of immunization from a health care provider or pharmacy;
- A copy of the COVID-19 Vaccination Record Card;
- A copy of medical records documenting the vaccination;
- A copy of immunization records from a public health or State immunization information system; or
- A copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine

Covered contractors may either physically inspect the vaccination documentation, or they may covered contractor employees to submit either a photograph, a scanned image, or PDF of the vaccination documentation.

2. Masking & Social Distancing.

In addition to the vaccination mandate, covered contractors must ensure that all individuals (including employees and visitors) comply with the CDC's guidance for masking and physical distancing at a covered contractor workplace. The masking and physical distancing requirements

for covered contractor employees differs based on whether the individual is fully vaccinated or not:

- Fully Vaccinated
 - In areas of high or substantial community transmission, fully vaccinated people must wear a mask in indoor settings.
 - In areas of low or moderate community transmission, fully vaccinated people don't have to wear a mask.
 - Fully vaccinated individuals do not need to practice physical distancing.
- Not Fully Vaccinated
 - People who are not fully vaccinated must wear a mask indoors and in crowded outdoor settings/outdoor setting that involve close contact with other non-fully vaccinated people.
 - The Guidance states that people who are not fully vaccinated should maintain 6 feet from others at all times, including in offices, conference rooms, and all other communal and work spaces.

Covered contractors may provide for exceptions to mask wearing and/or physical distancing requirements consistent with CDC guidelines, for example, when an individual is alone in an office with floor to ceiling walls and a closed door, or for a limited time when eating or drinking and maintaining appropriate distancing. Covered contractors may also provide exceptions for covered contractor employees engaging in activities in which a mask may get wet; high intensity activities where covered contractor employees are unable to wear a mask because of difficulty breathing; or activities for which wearing a mask would create a risk to workplace health, safety, or job duty as determined by a [workplace risk assessment](#). Any such exceptions must be approved in writing by a duly authorized representative of the covered contractor to ensure compliance with the Guidance at covered contractor workplaces.

3. Designation of Individuals (or Group of Individuals) to Coordinate Workplace Safety Efforts.

The third compliance component requires covered contractors to designate an individual (or group of individuals) persons to coordinate implementation of and compliance with the Guidance. For businesses that were required to designate an individual (or group of individuals) as part of a state-mandated preparedness plan, you can designate the same person(s).

Workplace safety protocols must also be communicated to covered contractor employees and all other individuals likely to be present at covered contractor workplaces. Such communication can be satisfied via email, posting on the company website, memorandum, flyer, or via signage at the workplace. Finally, the designated individual (or individuals) must ensure that covered contractor employees comply with the Guidance's requirements related to the showing or provision of proper vaccination documentation.

4. Verifying Subcontractor Adherence to the Federal Contractor Mandate.

Finally, the Guidance requires that covered contractors verify that applicable subcontractors adhere to the Federal Contractor Mandate. What this means in practice is that prime contractors (those who are contracting directly with the Federal Government) are required to flow down the Task Force Clause to their first-tier subcontracts. Higher-tier subcontractors must then flow the Task Force Clause down to the next lower-tier subcontracts. This flowdown must continue until the subcontract is solely for the provision of products. Once the subcontract is only for the provision of products, the Task Force Clause need not be incorporated into the subcontract.

*Please note that these are fast-moving times, and the information provided is only accurate as of the day posted (November 1, 2021). The information provided does not, and is not intended to, constitute legal advice; instead, all information is prepared and provided for general informational purposes only.
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