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Legal Overview – Executive Orders on Vaccine Mandates

On September 9, 2021, President Biden held a press conference introducing the administration’s “Plan to Stop the Delta Variant and Boost COVID-19 Vaccinations.” At this conference, the President announced a pair of executive orders that mandate COVID-19 vaccinations for (1) employees of the executive branch of the federal government and (2) employees of federal contractors and subcontractors, and also announced a forthcoming Emergency Temporary Standard (ETS) issued by the Occupational Safety and Health Administration (OSHA) regarding vaccinations and/or routine testing for employers with more than 100 employees.

Executive Order Mandating Vaccination of Federal Employees

The first Executive Order, *Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees* (the “Federal Employee Order”), requires federal employees to be vaccinated against the novel coronavirus and mandates that all federal agencies implement a COVID-19 vaccination requirement program. The Safer Federal Workforce Task Force (“Task Force”), which was established by Executive Order 13991, will issue guidance regarding the vaccination mandate by September 16, 2021. Thus far, the only available information regarding exceptions to the Federal Employee Order is that the mandate is subject to “any exception that is required by law.”

Executive Order Mandating Vaccination of Federal Contractors and Subcontractors

President Biden also issued a second Executive Order, *Executive Order on Ensuring Adequate Covid Safety Protocols for Federal Contractors* (“Contractor Order”), which likely will require vaccinations for federal contractors and subcontractors. The Contractor Order expressly directs that a new “contract clause”, to be created by the Federal Acquisition Regulatory

Council, will be inserted into federal contracts requiring contractors and subcontractors, for the duration of the contract, to comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (“Task Force”). Hence, it will be by contract – and not by direct regulation – that federal contractors and their subcontractors of all tiers will be responsible for complying with new COVID-19 protocols to be developed by the Task Force no later than September 24, 2021.

The coverage and scope of the new “contract clause” will be similar to that called for in the Biden Administration’s April 27, 2021 *Executive Order on Increasing the Minimum Wage for Federal Contractors*. Specifically, the “contract clause” shall apply, starting October 15, 2021 to:

- (1) all new contracts or contract-like instruments (with those terms being defined in the Department of Labor’s implementing proposed regulations on “Increasing the Minimum Wage for Federal Contractors” (86 Fed. Reg. 38816, 38887 (July 22, 2021)) or any resultant final rule),
- (2) new solicitation for contracts,
- (3) new extensions or renewals of contracts, and
- (4) the exercise of options for existing contracts.

While the “contract clause” requirements begin October 15, 2021, the Contractor Order makes clear that “agencies are strongly encouraged, to the extent permitted by law” to include the “contract clause” or otherwise contractually require contractor compliance with COVID-19 protocols prior to the October 15th date.

The kinds of contracts included within the scope of the Contractor Order are:

- (a) procurement contracts for services, construction, or leasehold interests in real property;
- (b) contracts for services covered by Service Contract Act;
- (c) contracts for concessions (including concessions contracts otherwise excluded by Department of Labor regulations); or
- (d) contracts entered into with the federal government in connection with federal property or lands and related to offering services for federal employees, dependents, or the general public.

Like the recently promulgated *Minimum Wage* Executive Order, the Contractor Order will not apply to:

- (1) grants,

- (2) contracts or agreements under the Indian Self-Determination and Education Assistance Act,
- (3) contracts for less than the “simplified acquisition threshold” as defined in Federal Acquisition Regulation 2.101 (generally defined as contracts for less than \$250,000, with some exceptions),
- (4) employees performing work outside of the United States, or
- (5) subcontracts solely to provide products.

Given the overall tenor of the Contractor Order, it is likely that any mandatory FAR clause will include flowdown provisions. So, prime contractors and subcontractors of all tiers should expect to amend their subcontracts to flow down the new FAR clauses (and, by implication, all of the resultant Task Force guidance) to all tiers of subcontractors, consistent with the scope and coverage provisions above. Again, given the nature of the Contractor Order, it is also reasonable to assume that contractor or subcontractor failure to comply with the new FAR clause could result in typical penalties seen in other Executive Orders regulating contractor employee minimum wages and Paid Sick Leave, including contract termination and/or debarment. Contractors and subcontractors are advised to pay close attention to the new FAR clauses and related Task Force guidance when they are issued, as well as subsequent updates from Husch Blackwell LLP on their effect and scope.

OSHA to Develop New Emergency Temporary Standard Requiring Vaccinations or Testing for Large Employers

The third and likely most expansive measure facing employers comes in the form of an explicit instruction to the Department of Labor/OSHA. President Biden directed OSHA to develop an ETS mandating *all* employers with 100 or more employees to require employees to either become vaccinated or to provide a weekly negative test result prior to entering the workplace. This requirement is estimated to impact over 80 million workers.

The ETS also will contain a provision requiring employers with 100 or more employees to provide paid time off for workers to (1) receive the vaccination, or (2) recover from any side effects experienced after being vaccinated.

Standard of Issuance of an ETS

The Occupational Safety and Health Act authorizes OSHA to issue an ETS if there is substantial evidence that: (1) “employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards;” and (2) an ETS is “necessary” to protect employees from that hazard. While the bar OSHA must clear here is not particularly high, it is real. In addition, OSHA’s track record in ETS rulemaking challenges is mixed. Given the nature of

this hazard, OSHA's recent decision not to issue an ETS that's applicable to all employees and the fact that a significant percentage of the nation's workforce will not be covered by the ETS, may present obstacles to issuance and enforcement.

When Will the ETS Take Effect?

There is immense uncertainty regarding when the ETS could be issued and take effect. We know the prior COVID-19 related ETS spent six months in development prior to issuance on June 21, 2021. However, OSHA indicated yesterday that this ETS would be issued in the coming weeks.

We will be monitoring publications from the Task Force, Director, and OSHA, and will provide continued updates regarding the status of the Executive Orders and the temporary rule.

Contact Us

If you have questions about this update and how it impacts your organization, contact Erik Eisenmann, Brian Hendrix, Michael Schrier or your Husch Blackwell attorney.

Your Comprehensive COVID-19 Legal Resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.