

CLIENT ALERT

President Biden Announces National Vaccination Strategy: Contractors Are Subject to New Vaccine Requirements

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On September 9, 2021, President Biden announced a six-pronged comprehensive national strategy designed to increase the number of vaccinated Americans and has issued Executive Orders (“EOs”) to further that end. We report on the specifics of that strategy [here](#). Particularly relevant to federal government contractors, the [Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors](#) requires executive departments and agencies to include a new clause in certain contracts and “contract-like instruments” (e.g., leases, licenses, permits, cooperative agreements, etc.) that requires contractors and subcontractors at any tier to comply with “all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force,” subject to the approval of the Office of Management and Budget (OMB). OMB will determine whether proposed guidance would promote economy and efficiency in federal contracting, and each determination must be published in the Federal Register. The EO specifically states that guidance will apply to “any workplace locations” where a government contractor “has an individual ... working on or in connection with” a federal government contract or contract-like instrument, which means this guidance will apply to both federal and contractor facilities. The Safer Federal Workforce Task Force must provide guidance, including applicable exceptions to the guidance, to contractors and subcontractors by September 24, 2021. Notably, the EO states that it does not excuse compliance with stricter state or local ordinances or agency instructions that establish more protective safety protocols.

The proposed safety clause must be inserted in certain types of new contracts or contract-like instruments entered into on or after **October 15, 2021**, as well as any such existing contracts or contract-like instruments that are extended, renewed, or have an option exercised on or after that date. An exception applies for any contract or contract-like instrument that will be awarded within 30 days of October 15 if the underlying solicitation was issued before the effective date. The EO also strongly encourages agencies to insert the proposed safety requirement into any contract or contract-like instrument that will be awarded before the effective date.

A contract or contract-like instrument is subject to the new requirement if it is:

- for services, including those covered by the Service Contract Act;
- in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public;
- for construction;
- for a leasehold interest in real property; and
- for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b).

The order does not apply to:

- grants;

- contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold;
- employees who perform work outside the United States or its outlying areas; and
- subcontracts solely for the provision of products.

The EO tasks the Federal Acquisition Regulation (“FAR”) Council with amending the FAR to require inclusion of the proposed clause in federal solicitations and contracts that are subject to the order. The EO concludes by stating that it does not create any right or benefit that is enforceable at law or in equity by any party against the Government or its agencies.

The EO itself does not expressly mandate vaccines, yet the administration’s six-prong plan signals that the employees of affected contractors will have to be vaccinated. This approach goes beyond the administration’s previously-announced plan in July, which provided that all federal employees and on-site contractors would be required to attest to their vaccination status, and anyone who was unvaccinated or unwilling to attest would be required to wear a mask, physically distance from others, and comply with regular testing.

Although COVID-19 vaccines are widely available to the public for free, contractors may still experience cost and schedule impacts as a result of this latest EO and implementing guidance and regulations. What the ultimate path to recovery may look like for each contractor will depend on how their respective contracts are structured, the clauses in the contract, and how the contractor treats similar costs. However, as listed below, there are certain best practices contractors can follow to maximize their ability to assert a successful claim in the future.

Notify the Contracting Officer (“CO”) promptly. Timely notice to the CO should be provided whenever a contractor experiences government-caused delays or cost impacts. Contractors should check the applicable clauses in their contract for any notice requirements and reference the applicable clauses in the notice.

Document as much as possible. *Preserve* any correspondences, emails, letters, *etc.*, that reflect CO direction to comply with the latest EO and implementing guidance and regulations (or directions regarding vaccination and/or testing requirements). *Document* how performance has been affected by the need to comply with the new requirement(s). Such evidence may be in the form of emails with employees or timesheets, as examples.

Create new charge codes. Implementing new charge codes is a forward-thinking approach that allows contractors to capture and segregate costs (*i.e.*, normal costs vs. impact costs). For example, vaccination-related delays or non-productive employee time can be tracked with separate charge codes, which would make it easier to prove the amount of any request for relief. Additionally, if FAR 52.243-6, Change Order Accounting, is incorporated into the contract, then a contractor is required to separately track the costs of changes.

Reserve your rights. In the event a contractor executes a modification or settlement that includes a release of claims, the contractor should expressly reserve its right to recover any outstanding and/or future claims related to the vaccination requirements. Otherwise, there is risk that a claim could be later deemed to have been released.

Continue to perform. Contractors have an ongoing duty to continue performance even if performance becomes more difficult or expensive due to the vaccination requirement.

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