

Biden Administration Confirms COVID-19 Liability Protections for Federal Contractors, Employees and Volunteers

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On February 16, 2021, Acting Secretary of the US Department of Health & Human Services (“HHS”) Norris Cochran, published in the Federal Register the Sixth Amendment to the Declaration Under the Public Readiness and Emergency Act [“PREP Act”]. 86 Fed. Reg. 9516-9520 (Feb. 16, 2021). This is the second amendment to the Declaration issued since President Biden took office and continues the Trump Administration’s practice of providing broad liability protection for those responding to COVID-19.

The Declaration originally was issued on January 31, 2020, by former HHS Secretary Azar. Pursuant to the PREP Act, the Declaration allows the Secretary to extend liability immunity to “covered persons” for taking allowed actions with respect to “covered countermeasures,” in prescribed circumstances, all as declared by the Secretary. A “covered person” is “immune from suit and liability under Federal and State law for all claims of loss caused by, arising out of, relating to, or resulting from the administration or use of a covered countermeasure,” which includes FDA-authorized COVID-19 vaccines and tests. *See* 42 U.S.C. § 247d-6d(a)(1). Under the PREP Act, “covered persons” include “manufacturers,” “distributors,” “program planners,” “qualified persons,” and their “officials, agents and employees.” 42 U.S.C. § 247d-6d(i)(2).

In the Sixth Amendment to the Declaration, the Acting Secretary augmented the “covered persons” protected from liability with an additional category of “qualified persons.” Although the United States is, by statute, a “covered person,” the structure of the statutory provision defining “covered person” does not make clear that direct contractors and employees of the United States are similarly covered. *See* 42 U.S.C. § 247d-6d(i)(2). To clear up that ambiguity, the Sixth Amendment provides that a “qualified person” includes “any Federal government employee, contractor or volunteer who prescribes, administers, delivers, distributes or dispenses a Covered Countermeasure,” if the federal department or agency “has authorized or could authorize” that person “even if those authorized duties or responsibilities ordinarily would not extend to members of the public or otherwise would be more limited in scope than the activities such employees, contractors or volunteers are authorized to carry out under this declaration.” 86 Fed. Reg. at 9519 (Feb. 16, 2021).

This expanded liability protection is fully consistent with and will support President Biden’s *National Strategy for the COVID-19 Response and Pandemic Preparedness*, which envisions federal vaccination sites and “deploy[ing] thousands of federal staff, contractors and volunteers to support state and local vaccination efforts.” See *National Strategy*, pp. 9, 52.

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