

Client Alert: Biden Administration Calls for Prompt Vaccination of Federal Employees and Government Contractors; No Testing Opt-Out Available.

Publications

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On September 9, 2021, the Biden Administration announced additional measures to curb the ongoing spread of COVID-19. These measures include one executive order requiring all federal executive branch workers to be vaccinated and a second order extending this mandate to federal contractors.

The first order requires COVID-19 vaccination for all federal executive branch employees as defined in 5 U.S.C. § 2105. Under the order, executive agencies must implement programs requiring vaccination for all federal employees, with exceptions only as required by law. The order calls on The Safer Federal Workforce Task Force (Task Force) to issue guidance with respect to agency implementation of the program requirements within seven (7) days of the order's issuance. During a September 9 press briefing, the White House Press Secretary stated that federal employees will have approximately 75 days to become fully vaccinated to avoid facing possible disciplinary action. The projected compliance date falls on November 23, 2021, the Tuesday before Thanksgiving.

The second order aims to ensure "that the parties that contract with the federal government provide adequate COVID-19 safeguards to their workers performing on or in connection with" federal contracts. Under this order, agencies must ensure that federal contracts and subcontracts incorporate a clause specifying 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 [Task Force]," if the guidance is approved by OMB after that agency determines that the Task Force's guidance "will promote economy and efficiency in Federal contracting." The contract clause "shall apply to any workplace locations ... in which an individual is working on or in connection with a [federal] contract or contract-like instrument." The order requires the Task Force to issue guidance applicable to federal contractors, including definitions, protocols, and exceptions, by September 24, 2021. Consistent with the Administration's messaging, the Task Force guidance is expected to extend to federal contractors the same vaccination requirements imposed on federal employees.

While the order is designed to apply broadly, excluded from its scope are federal contracts or “contract-like instruments” that are:

- grants;
- contracts with Indian Tribes;
- contracts at or below the simplified acquisition threshold;
- contracts where the employees perform work outside the United States or its outlying areas; and
- subcontracts solely for the provision of products.

These executive orders reach significantly beyond President Biden’s July 2021 requirements for federal workers and on-site contractors to become vaccinated, which had allowed an employee to opt out of vaccination by taking weekly or twice-weekly tests and practicing other workplace safety measures. Indeed, these orders are just two components of the Biden Administration’s rollout of a broader, six-pronged plan to combat the COVID-19 pandemic as the Delta variant continues to spread. The comprehensive plan includes, among other things, the issuance of an Emergency Temporary Standard by the Occupational Safety and Health Administration (OSHA) that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require their unvaccinated workers to produce a negative test result on at least a weekly basis before coming to work.

Jenner & Block will be closely monitoring guidance issued by the Task Force and regulations issued by the FAR Council and OSHA, and other agency-specific actions. We will issue updated alerts as new information comes out. Our lawyers stand ready to assist our clients as they determine how to respond to the Administration’s latest requirements and guidance.

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