

Practice Update

Office of Management and Budget Issues Guidance on Implementation of Federal Contractor COVID-19 Vaccine Mandate

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On September 9, 2021, President Biden issued Executive Order 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors* (“Executive Order”). The Executive Order effectively required executive agencies to include a COVID-19 vaccine mandate in most federal government procurement contracts and contracts for services, construction, or leases. More specifically, the Executive Order directed Executive departments and agencies to include in these contracts a new FAR clause specifying that the contractor shall comply with all guidance published by the Safer Federal Workforce Task Force (“Task Force”). The Task Force would then issue guidance pertaining to COVID-19 safety protocols, including a vaccine mandate.

In December 2021, the United States District Court for the Southern District of Georgia issued a nationwide injunction barring enforcement of the Executive Order’s contractor vaccine mandate.^[1] In August 2022, the United States Court of Appeals for the Eleventh Circuit overturned the District Court’s decision in part, ruling that a nationwide injunction was overbroad. The Eleventh Circuit held that the injunction prohibiting enforcement of the vaccine mandate should only apply to the parties in that specific case.^[2] The Eleventh Circuit’s ruling took effect on October 18, 2022.

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On October 19, 2022, the Office of Management and Budget (“OMB”) issued interim guidance to agencies concerning the implementation of the Executive Order, in light of the Eleventh Circuit’s ruling. In its interim guidance, the OMB effectively instructs agencies to operate as if the nationwide injunction had not been lifted. More specifically, the OMB advised agencies:

1. For existing contracts that contain a clause implementing the requirements of Executive Order 14042, **NOT** to enforce such clauses implementing the requirements of the Executive Order.
2. For existing contracts that do not include a clause implementing the requirements of Executive Order 14042, **NOT** to modify the contract to include such requirements.
3. For new solicitations (including for new orders under IDIQ contracts), **NOT** to include a contract clause implementing the requirements of the Executive Order.

It is important to note that the OMB’s October 19, 2022 guidance was issued on an interim basis, and is subject to change pursuant to updated guidance from the Task Force and/or OMB. The Task Force has stated that it will provide updated guidance, which will include an updated timeline for implementation by contractors and subcontractors. After the Task Force issues its updated guidance, the OMB will provide direction to agencies regarding enforcement of contract clauses implementing the Executive Order. While the OMB’s interim guidance effectively maintains the status quo with respect to the nationwide injunction on a federal contractor vaccine mandate, it is essential that government contractors and subcontractors closely monitor the expected updates from the Task Force and OMB. Given the Eleventh Circuit’s lift of the nationwide ban, future guidance may seek to implement the contractor vaccine mandate for states where the injunction is no longer legally applicable.

Also note that the OMB's interim guidance applies only to the implementation of the federal contractor vaccine mandate pursuant to Executive Order 14042. At this time, there is no change to the Task Force's guidance for COVID-19 workplace safety protocols for Federal agencies and their employees pursuant to Executive Order 13991. Moreover, federal agency workplace safety protocols for Federal buildings and Federally-controlled facilities still apply. Contractor employees working onsite in those facilities must still follow those Federal agency workplace safety protocols.

Akerman government contract attorneys can assist with monitoring and understanding future guidance issued with respect to the Executive Order and/or COVID-19.

[1] A January 21, 2022 Order from the Judge clarified that the injunction only applied to the vaccine mandate, and not other guidance published by the Safer Federal Workforce Task Force, such as social distancing or mask requirements.

[2] Those plaintiffs included the states of Alabama, Georgia, Idaho, Kansas, South Carolina, Utah, and West Virginia, as well as members of Associated Builders and Contractors (ABC), a trade association.

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