

Podcast

Federal Contracts and Vaccine Mandates: A New Order

By Kathryn J. Barry

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Meet the Authors



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Federal contractors and subcontractors recently received guidance from the Safer Federal Workforce Task Force when applying President Biden's Executive Order Ensuring Adequate COVID Safety Protocols.

Jackson Lewis P.C. · Federal Contracts and Vaccine Mandates: A New Order



Transcript

Alitia:

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating [00:00:30] the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted? Federal contractors and subcontractors were left with a lot to consider recently when the Safer Federal Workforce Task Force issued guidance applying president Joe Biden's executive order ensuring adequate COVID-19 safety protocols to all federal contractors. On this episode of We get work™, we discuss the guidance, [00:01:00] which dictates that covered employees must be fully vaccinated unless legally entitled to an accommodation and the many federal lawsuits already filed challenging the legality of the order and seeking a stay of the order pending a full adjudication on the merits.

Our hosts today are Kate Barry, Principal in the Long Island office and Chris Chrisbens of Council in Denver office of Jackson Lewis. Kate helps federal

contractors prepare affirmative action plans and defends contractors against [00:01:30] allegations of discrimination in connection with audits by the Office of Federal Contract Compliance Programs and in related litigation brought by the solicitor's office at the US Department of Labor. After many years as the manager of affirmative action planning and OFCC compliance in both law firm and employer association settings, Chris represents and provides training to federal contractors in all facets of affirmative action planning and OFCC compliance. Kate and Chris, [00:02:00] the question on everyone's mind today is, what do employers need to know about the application of President Biden's executive order on COVID-19 to federal contractors and how will that impact my business? Subsequent to the recording, the Biden administration extended the full vaccination deadline for federal contracts from December 8th to January 4th, in order to coincide with the January 4th deadline under the new OSHA emergency temporary standard.

Kate Barry: [00:02:30]

Thanks Alitia. And it's a great question. For those employers who have to comply with the executive order, the potential impact on your business is huge. And I know there are a lot of employers out there wondering what this all means and whether it applies to them. So, Chris, what is the executive order, exactly, and who does it apply to?

Chris Chrisbens:

Yeah, thanks Kate. So on September 9th, President Biden issued an executive order, which is entitled Ensuring Adequate COVID Safety Protocols for Federal Contractors. And [00:03:00] it's really a vaccine mandate for federal contractor employees, which is part of the President's broader COVID effort. On September 24th, the Safer Federal Workplace's Task Force issued specific guidance and very helpful FAQs that are really the requirements to implement the executive order. Now, the order and guidance are implemented only through a contract clause in covered contracts. If the clause doesn't appear [00:03:30] in a contract or subcontract, the order does not apply, which begs the question, what contracts are covered? And it may seem like it, but not all federal contractors are necessarily covered. The executive order applies to four types of contracts. Procurement contracts for services, including construction contracts over \$250,000, which is the simplified acquisition threshold. It also applies to [00:04:00] service contracts covered by the prevailing wage requirements of the Service Contract Act.

It applies to concession contracts and contracts for the provision of services on federal land. Notably, contracts for products are not expressly covered. Grants are specifically excluded and the mandates only apply to employees working in the United States. However, that's really just the beginning because the executive order and [00:04:30] the guidance also strongly encourage federal agencies to significantly expand the scope of the mandate to other types of contracts. For instance, contracts below that \$250,000 simplified acquisition threshold. Agencies are strongly encouraged to apply the executive order even to contracts for products. And although the order applies to new contracts [00:05:00] and extensions and renewals of existing contracts, agencies are also asking, and I put that in quotes, contractors to agree to unilaterally modify existing contracts, to include the clause that requires

compliance. So, federal contractors really need to first determine what kinds of contracts they currently have or might have in the future that could include the clause [00:05:30] and plan accordingly.

If a contractor has a covered contract, what employees are subject to the vaccine, the masking and distancing mandates? Well, the order speaks of two categories. First, is covered employees and that's anyone working on or in connection with a covered contract or subcontract. An employee works in connection with a covered contract if he or she provides indirect support services to [00:06:00] the contract. That's very broad, and intentionally so. The order also speaks of covered workplaces, meaning if you have a covered employee who works at a particular facility, all employees at that facility are also covered employees, subject to the mandates. Again, extremely broad.

What about our remote workers? They're subject to the vaccine mandate if they work on a covered contract [00:06:30] from home, from wherever, but are not subject to the masking or distancing requirements. So, Kate, the order seems very broad and agencies are applying it very broadly, but are there risks in being overzealous in terms of coverage?

Kate Barry:

And Chris, because nothing is ever easy, there are risks in assuming coverage, even if it might not exist. And there are risks in applying the mandate [00:07:00] in broad strokes to your entire workforce, even to employees who might not meet that definition of covered workers under the executive order. And the risk falls into two real buckets. The first is for employers who are operating in states that have prohibited vaccine mandates. As we sit here talking today, that's really Montana and Texas, but that's a list that we expect will evolve pretty quickly [00:07:30] because it is an area that a lot of state legislatures and governors are focusing on. If you are a federal contractor or subcontractor in one of those states that have prohibited a vaccination mandate, there are potential defenses to a state law claim under the supremacy clause. And while I won't get into the details of those defenses on this podcast, the important thing for employers to remember is that those defenses [00:08:00] won't apply if the executive order doesn't actually apply to you.

And they won't apply if the employee who is potentially challenging the vaccine mandate, isn't a covered worker under the executive order. Even if you are outside one of those states, though, you are in a state or a location that doesn't have any vaccination prohibitions at all, a voluntary vaccination mandate, [00:08:30] so one that is not required by the executive order, but is just being implemented by the employer by its own choice, has to comply with the Americans with Disabilities Act. It to be job-related and consistent with business necessity. For your employees who are on-site, who are coming to an office who are actually going to work, that's a threshold that you can probably meet. There are safety reasons why you want to have your on-site employees vaccinated. But if you have remote employees who don't [00:09:00] fall into that broad definition that Chris, you were just explaining, but who might be in your company and you might say, it's just easier for us to apply the mandate to everyone.

Well, if one of those employees who's working remotely, isn't a covered worker and they challenge the mandate, you might have a tough time establishing that it was job-

related and consistent with business necessity. The key takeaway for employers here is that coverage, even though is very broad. It's not [00:09:30] a yes or no box. It's not, I am covered or I am not, and it's not, if I'm covered, all of my employees are covered and therefore everybody has to comply with the mandate. It's a more sophisticated analysis that may to some degree require an employee-by-employee review, which can be a heavy lift for employers. And so, Chris, with that in mind, how long do employers have to do this analysis and to get into compliance with the executive [00:10:00] order?

Chris Chrisbens:

Thanks Kate. And really the train has already left the station. The contract clause started to appear in contract solicitations beginning October 15th. Technically, the executive order will not apply to new contracts until November 14th. But again, importantly, as I mentioned, we're already seeing agencies aggressively request modifications of even current contracts to include the clause. And I think one [00:10:30] of the best pieces of advice that we can give in this regard is to keep an open line of communication with your contracting officer. If you get that request for a bilateral unification of your contract, you do have the legal right to decline that modification. Now that may have implications to the business. For instance, we are seeing that agencies are saying, if [00:11:00] you do not agree to this modification, we will not extend or renew or exercise options or enter new contracts with you in the future.

So there are potential consequences, practical business consequences, to not agreeing to that modification even though you have the legal right to do. And so again, my point, of the greatest takeaways I think here, is to keep an open line of communication with your contracting officer and see [00:11:30] if you can negotiate the terms and conditions of your compliance. And at all times make sure that the agency knows that you're taking reasonable efforts and good faith to comply with the clause to figure out what the parameters are, what the expectations of the agency are, for you.

Now, most importantly, the order requires covered employees to be fully vaccinated by December 8th, not too far [00:12:00] down the road. If the clause appears in contracts after December 8th, the deadline is the date of first performance of the contract. Now, one of the things here that we've omitted to this point is, are there any exceptions to the mandate requirement and under the federal executive order, the answer is not really. Testing is not an alternative to full vaccination. The only exception here [00:12:30] is going to be if an employee is entitled to a medical or religious accommodation. So Kate, what do federal contractors need to know about accommodations?

Kate Barry:

And this is probably going to be the toughest issue for covered contractors and subcontractors to deal with as they roll out the vaccine mandate to their employees. And as they try to meet the time limits [00:13:00] that you just shared. The executive order states very clearly that employees who are entitled to a legal exemption, or legal accommodation, are not required to be vaccinated against COVID-19. And what employees are required or entitled to a legal accommodation? Well, it's going to be

employees who have a medical condition that precludes vaccination, and employees with a sincerely held religious [00:13:30] belief, practice, or observance that precludes vaccination. Now the contractor or subcontractor has an obligation under the executive order to make sure that an employee who requests an accommodation is actually legally entitled to that accommodation before the contractor or subcontractor simply says, we're not going to require you to be vaccinated.

And what that means is a lot of employers [00:14:00] are struggling with what information do we have to get from our employees? What pushback should we be giving, if any? And will the failure to get this information or the failure to provide a requested exemption lead to potential legal claims?

So the first is, contractors have to make sure that they have an established process in place for how they are going to have employees request accommodations, [00:14:30] and how they are going to review and approve or deny those accommodations. So this should be something that is very similar to your established practice for requesting a medical or religious accommodation in the non COVID-19 context, but has to be refined to specifically address these issues. If you are an employer covered by the executive order, you should have exemption request forms that are [00:15:00] specific to employees who are going to request a medical exemption from the vaccination requirement and employees who are going to request a religious exemption.

Now from a medical standpoint, you will want to both have the employee certify that they have a medical condition that is either temporarily or permanently keeping them from being vaccinated. But you will also want to make sure that the employee's medical [00:15:30] provider is signing off on that request. It shouldn't just be from the employee. We should be getting some certification from a healthcare provider that the exemption is actually necessary. Employers in California, like everything else in California, should be mindful of that state's restrictions on the information you can request and information about medical conditions that you request. So if you are in California and really, if you are anywhere, I suggest [00:16:00] you reach out to your employment attorney to make sure you're both asking the correct information in your medical exemption request form, but also that you're not going a step too far in making a prohibited disability inquiry, because it is a fine line to walk.

The medical exemptions are probably going to be a little bit easier to administer for employers than the religious exemptions because religious exemptions are more amorphous than a medical exemption. [00:16:30] Title VII defines religion extremely broadly. So employees are entitled to a religious accommodation, even if the accommodation that they are requesting is not in line with a formal religion, or not in line with a religion's formal dogma. So for example, we are seeing a lot of employee religious exemption requests that state their Catholicism [00:17:00] prevents them from receiving the vaccine. And a lot of employers first response is, and it's an understandable one, well, I thought the Pope came out and said that you could be vaccinated. So if this employee is saying that they can't get the vaccine because they're Catholic and the Pope says it's okay, shouldn't I be denying that request?

I understand the question from the employer, but the answer is the EEOC is clear. My religious [00:17:30] belief doesn't necessarily need to be in line with my religion's

formal stated beliefs in order to be protected. I could be the only person with my belief. My belief might be completely different than the religion's stated dogma. And as long as it's sincerely held, it's entitled to protection under the law. And I'm probably entitled to an exemption from the vaccine mandate. So what information do employers need to get in order to [00:18:00] assess an employee's religious accommodation request? They need to get enough information to show that request is sincerely held. And to show that even within that broad definition of what a religion is, that the request is religious in nature, meaning it can't just be socio or political. It needs to have some, even as broadly defined, religious tie. Employers should have a standardized form that makes employees [00:18:30] lay out what their religious belief is and why that religious belief is interfering with their ability to get an accommodation or get a COVID-19 vaccination.

And when employers receive those forms, they need to do an individualized analysis. They shouldn't just be rubber stamping the exemption requests. While your ability to push back and get more information in the religious context is quite limited, you still [00:19:00] need to make sure that in their request, there is enough basically there to justify the exemption from the COVID-19 mandate, or you might have compliance issues in terms of whether or not you're complying with the executive order. So the most important thing for employers to keep in mind now is, if you are covered, or if you think coverage is coming down the line, make sure you have an established process with specific forms and protocols for how you are [00:19:30] both going to be requesting this information from employees, and how you are going to be analyzing and assessing their requests.

In terms of what the ultimate accommodation is going to be, employees are requesting an exemption from the vaccine mandate. The accommodation is going to be an exemption that says they don't need to get the vaccine either temporarily or permanently. You will need to assess what that means [00:20:00] for their employment in the workplace. Will they need to get tested in lieu of the vaccine? Will they need to follow certain safety protocols? Keep in mind that the executive order, while a lot of the focus is on the vaccine component, does have masking and physical distancing protocols. And certain of those protocols are specific to unvaccinated employees. So employees who are granted exemption requests, we need to make sure [00:20:30] that they are complying with those protocols. It might be telework for employees who would otherwise be on-site. It really is going to be an employee-by-employee analysis that could potentially take a lot of HR time and resources, so is something that employers need to be thinking about now and thinking about rolling out if they haven't done so already.

Now, Chris, is there anything, we talked about the concerns or the risks [00:21:00] in being overzealous in applying coverage or in assuming coverage. Is there anything that subcontractors in particular can do to check in with prime contractors, or try to get their hands around whether or not they're going to have flow down obligations? Because it seems like there are a lot of subcontractors out there who are being left in the dark.

Chris Chrisbens:

Yes, that's right, Kate. And it really goes back to what I said earlier. Instead of prime

contractors keeping in touch [00:21:30] with their contracting officers at the agency, it's really the same thing for subcontractors. Keep in touch with your prime contractor, figure out what their expectations are going to be. And we're seeing a spectrum of responses by prime contractors. Some prime contractors just simply flowing down the clause to covered subcontractors and not requiring any follow up. On the other end of the spectrum, some prime contractors are being very aggressive with subcontractors, [00:22:00] requiring them to certify compliance with the clause. So again, I think the same principle applies, stay in touch with your prime contractor, figure out what their expectations may be so that you can comply as required by your prime contractor.

Kate Barry:

Well, it sounds like employers are going to have a very busy November in terms of getting their hands both around whether they're covered, who coverage applies to, and if so, what they're going to need to do in order to make sure that they have [00:22:30] their accommodation and exemption processes in place. So Chris, so what are your key takeaways here?

Chris Chrisbens:

I think the biggest takeaway is figure out what current contracts you have that might be covered, anticipate a modification, and figure out what contracts you might have that are up for renewal or extension in the future, or what new contracts you might have coming down the road. So you can take steps to prepare for the [00:23:00] clause appearing. What about accommodations, Kate? What can employers do to prepare in the accommodation realm?

Kate Barry:

So the biggest thing for lawyers to do from an accommodations standpoint is if you are covered, or you think you are going to be covered, get your accommodations process in place now. Have your forms ready to go, have your internal team identified and trained on this process. So if and when you've confirmed coverage, [00:23:30] you're going to be able to get over the finish line in what's a pretty short time period that contractors have to get into compliance.

Chris Chrisbens:

Thanks Kate.

Kate Barry:

Thanks Chris. It was great talking to you.

Alitia:

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