



What Does the New Executive Order on COVID Safety Protocols Mean for Federal Contractors and their Employees?

by Milton C. Johns, Esq., Managing Member, September 14, 2021

Summary: The Executive Order requires the FAR to be amended by October 15, 2021 to add a mandatory clause providing direction to Federal contractors on vaccination of employees. This clause will be included in any new Federal contract action after October 15, 2021, including solicitations, new contracts, contract modifications, extensions, renewals, or the exercise of contract options. To date, the formal guidance on what the clause contains has not yet been issued.

Introduction

The continuing COVID-19 pandemic has ushered in a series of legal dilemmas unseen in modern times in the United States. Besides the day-to-day challenges of maintaining operations and supporting Agency clients while protecting employees, Federal contractors now face a new



challenge with President Biden’s September 9, 2021 “Executive Order Ensuring Adequate COVID Safety Protocols for Federal Contractors.”

Executive Law Partners, PLLC (XLP) has looked at the EO, and we have performed a preliminary analysis. This white paper is not specific legal advice, and every situation will be different with each Federal contracting agency. But we can offer our preliminary analysis as follows.

Analysis

The EO does not (yet) mandate vaccines for Federal contract employees. There are several steps that must occur before any mandatory vaccinations take place, and frankly before we even know what the scope of the requirements for Federal contractors will be. First, the Safer Federal Workforce Task Force (Task Force) must generate a “guidance” for contractor workplace COVID safety by September 24, 2021. This Guidance may include the requirement for vaccinations, it may provide exceptions or exemptions, or it may include completely different guidance. At this time, we do not know what the Guidance will be, but we at XLP predict it will require some form of mandatory vaccinations. Second, the Guidance must be submitted for approval to the Director



of the Office of Management and Budget (OMB) for a determination that, if implemented, the Guidance would “promote economy and efficiency in Federal contracting.” Third, the Task Force must also, by September 24, 2021, provide “definitions of relevant terms for contractors and subcontractors, explanations of protocols required of contractors and subcontractors to comply with workplace safety guidance, and any exceptions to Task Force Guidance that apply to contractor and subcontractor workplace locations and individuals in those locations working on or in connection with a Federal Government contract...” Fourth, if the Director of OMB approves the Guidance, the Federal Acquisition Regulation (FAR) Council must amend the FAR by October 8, 2021, to include a new FAR clause that includes the Guidance, and to implement policy direction to acquisition offices to use the new clause in new contracts. Fifth, the new FAR clause will then be included in all new solicitations and contract awards, extensions, renewals, and exercises of contract options, issued on or after October 15, 2021.

There are a few exceptions, but most Federal contracting actions taken after October 15, 2021, will likely contain this new clause containing the Guidance.



On September 13, 2021, the Task Force issued “Model Agency Safety Principles” that do not provide the specific guidance for contractors but do address the requirement that onsite Federal contract employees must provide proof of a negative COVID-19 test within 3 days of entry into a Federal building, unless they are already subject to an existing Agency testing program. We expect these “safety principles” will provide insight into the Guidance the Task Force must issue.

Conclusions

The good news for the short term is that there is no immediate action for Federal contractors to take, other than the requirements to enter Federal facilities for onsite contractors. And until the Task Force Guidance is issued, it is premature to predict the impact. We do expect the Guidance will require vaccinations for Federal contractor employees with some exceptions for medical and religious reasons, but that is educated speculation as of this date. Further, it is unclear what level of effort will be undertaken to amend existing contracts to add the new clause; in the absence of this contractual requirement, Federal contractors should not be obliged to conform to any vaccination protocols.



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Once the Guidance is issued, we urge Federal contractors to consult legal counsel to review the clause and craft a plan to comply with the clause.

With all of that said, we expect that this new requirement will face testing in Federal courts. While the clause will be mandatory for contractors, court action may completely change the implementation.

This is not legal advice, but rather a preliminary analysis of the EO. XLP is happy to discuss your specific concerns and requirements and provide legal advice to existing and new clients.

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