

Who is a Federal Contractor for Purposes of the Biden Vaccine Mandate?

Article

Amundsen Davis COVID-19 Alert

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On September 9, 2021 President Biden announced sweeping new vaccine mandates for federal employees, federal contractors, and an upcoming OSHA Emergency Temporary Standard Rule for companies with more than 100 employees. In light of this, already many employers are asking the question, “Am I a federal contractor subject to the vaccine mandate?” While the Executive Order regarding federal contractors is brand new, and we are awaiting more clarification from the Safer Federal Workforce Taskforce (Task Force), there is some language contained in the Order that can give employers an early roadmap. The Executive Order applies to federal contracts that are:

- Either a contract or contract-like instrument;
- Entered into, extended, renewed, or has an option exercised on or after October 15, 2021;
- For any of the following:
 - services, construction, or leasehold interest in a property;
 - services covered by the Service Contract Labor Standards (formerly known as the Service Contracts Act);
 - concessions; and
 - work relating to federal property or lands and related to offering services for federal employees, their dependents, or the general public.

The Executive Order explicitly excludes:

- Federal grants;

- Contracts with Indian Tribes;
- Employees who perform work outside of the United States;
- Contracts equal or less than the simplified acquisition threshold (generally \$250,000); and
- Subcontracts solely for the provision of products.

However, the Executive Order leaves several unanswered questions that will hopefully be answered by the Task Force, which must issue its guidance by September 24, 2021. For example, it is not clear if the mandate will be for onsite contractors only, but initially it appears to also cover employees working at the contractor's facility. It specifically states it applies to "workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument." Thus, the Executive Order is phrased to apply to any workplace locations where contract work is performed, rather than to employees performing the work. Also, it appears to eliminate the option for federal contractor employees, provided for in the July 29, 2021 federal employee vaccination mandate, that allowed those workers to choose to wear a mask, socially distance, and subject themselves to regular testing instead of getting vaccinated.

As with all vaccine mandates, there will likely be exceptions for disabilities or sincerely held religious beliefs. Each employer will have to make individual determinations regarding these exemptions.

Some general takeaways at this time are that if you are a business operating under an existing federal contract that is not being renewed or has options exercised, you are not subject to the Executive Order. Similarly, if your contract is for less than \$250,000 you are likely not subject to the mandate. However, it appears as if it is not limited just to onsite contractors (such as those in the construction industry), and so the vaccine mandate could expand to many more businesses (such as banks) that are operating under a federal contract yet not providing onsite work to federal agencies.

Of course, all this is very preliminary given the lack of guidance from the Task Force. But for now, employers can at least get an idea of whether or not they are a contractor for purposes of the Executive Order. While the specific details of the mandate are still to come, businesses who have new or renewed federal contracts (greater than \$250,000) coming up can expect some sort of vaccine mandate on at least part of its workforce, and should begin to plan accordingly. We will be monitoring this situation closely and will provide updates as they occur.

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