

ALERT

D.C. Vaccination Mandate Will Likely Require Action from Contractors in the Coming Weeks

August 13, 2021

WHAT: The Delta variant of the Coronavirus continues to spread, and District of Columbia Mayor Muriel Bowser continues to be active in taking steps to limit the spread of COVID-19 in the District. On August 10, 2021, Mayor Bowser followed her July 29, 2021 Order reinstating the District's indoor mask mandate with Mayor's Order 2021-099, which requires District employees and interns to certify that they have been vaccinated or submit to weekly COVID-19 testing. The Order further requires District government "contractors and grantees" to ensure that certain workers are fully vaccinated or submit to frequent COVID-19 testing.

Requirements, Privacy Considerations, and Penalties

Requirements

Mayor's Order 2021-099 is effectively D.C.'s equivalent of President Biden's July 29, 2021 mandate requiring all federal employees and onsite contractors to either attest to their fully vaccinated status or submit to weekly COVID-19 testing.

Unlike its federal comparator, the D.C. Order clearly defines the class of contractor or grantee workers it applies to. Mayor's Order 2021-099 explains that contractors and grantees are required to "ensure that each of their employees, agents, and subcontractors who provide goods or perform services in-person in District of Columbia facilities or worksites, or who have in-person contact with other persons to complete their work under [a] contract or grant [with the District]" are: (i) fully vaccinated against COVID-19; or (ii) undergoing weekly COVID-19 testing and only reporting to the workplace when such test results are negative. Fully vaccinated

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workers must still wear masks indoors per the Mayor's July 29, 2021 indoor mask mandate. The Order also appears to suggest that workers who are not certified as being fully vaccinated must continue to wear masks indoors even if the Mayor rescinds her indoor mask mandate.

Mayor's Order 2021-099 takes a different approach than President Biden's mandate by requiring contractors to certify their workers' compliance with the Order (whereas the federal mandate appears to require workers to certify their compliance to the government directly). Based on the Order's wording, it seems likely that contractors and grantees will be expected to bear the costs associated with testing their workers.

Privacy Considerations

The federal mandate raised questions about privacy for many contractors and their workers. Introducing a separate set of disclosure requirements for contractors with workers who appear on District government sites will likely raise similar concerns.

Mayor's Order 2021-099 explains that "[c]ompleted vaccination certification forms . . . shall be treated as private records exempt from disclosure [under D.C.'s Freedom of Information Act]" but that the information "may be used internally for verification, staffing, payroll, and assignments, and as any other operational needs may require, consistent with local and federal laws and regulations." Thus, per the U.S. Equal Employment Opportunity Commission's (EEOC's) technical guidance concerning the confidentiality and use of vaccination information and COVID-19 test results, the District should maintain and use the information it receives from contractors according to the Americans with Disabilities Act's requirements for medical information.

Penalties

The Order provides that contractors' failure to comply with its requirements could lead to "adverse consequences." However, it does not include any language clarifying the type and scope of potential penalties for noncompliance.

Procedures and Deadline for Compliance

Procedures

The Order directs the City Administrator to establish a vaccination certification procedure, authorizes the City Administrator to amend any certification procedures to account for booster shots in the future, and allows the District's Office of Contracting and Procurement and District government agencies to issue change orders and enter into amendments to current grant agreements and grant award notifications consistent with any vaccination certification requirements issued by the City Administrator.

Deadline for Compliance

The Order provides that D.C. Government employees and interns must comply with its requirements by September 19, 2021. However, the Order does not specify a date by which District contractors and grantees

must comply with its requirements.

TAKEAWAYS: The federal employee vaccination mandate already raised several questions for contractors, which will perhaps soften the impact of the District of Columbia's decision to implement similar requirements for contractors. Mayor's Order 2021-099 *should* have a more straightforward path to implementation than the federal mandate because a single office, the Office of the City Administrator, is tasked with creating the certification standards for contractors. Companies that contract with the District of Columbia government should remain alert for additional information concerning the implementation of Mayor's Order 2021-099 from the City Administrator, the Office of Contracting Procurement, and the District agencies they contract with.

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