

ASSESSING THE IMPACT OF COVID-19 FEDERAL CONTRACTOR REQUIREMENTS ON COLLEGES AND UNIVERSITIES

In remarks on September 9,¹ President Biden pointedly spoke about the COVID-19 “pandemic of the unvaccinated,” focusing on the “nearly 80 million Americans who are still not vaccinated, even though the vaccine is safe, effective, and free.” In this context, he outlined the primary goals of his COVID-19 Action Plan²: get more people vaccinated; decrease hospitalizations and deaths; and keep schools and our economy open. The action plan emphasizes using “every available tool to combat COVID-19,” with vaccinations as its centerpiece.

Saying that “[i]f you want to do business with the federal government, vaccinate your workforce,” President Biden then signed Executive Order 14042,³ directing federal departments and agencies to include a new clause in government contracts and “contract-like instruments” to require both federal contractors and their subcontractors to comply with COVID-19 workplace safety guidance issued by the Safer Federal Workforce Task Force. On September 24, the task force issued guidance⁴ which directs that federal contracts or “contract-like instruments” valued above \$250,000 include provisions mandating vaccinations and other protocols for contractors’ and subcontractors’ employees, which will include student employees. The protocols, as drafted, also are likely to apply to many students who are not employees.

President Biden also announced two other features of his action plan on September 9 that are relevant to colleges and universities.

First, the Occupational Safety and Health Administration (OSHA) is developing an Emergency Temporary Standard (ETS) which will require large employers (over 100 employees) under OSHA’s jurisdiction “to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work.” To be released in the coming days or weeks, this ETS will be

1 <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>

2 <https://www.whitehouse.gov/covidplan>

3 <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>

4 https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf; and <https://www.whitehouse.gov/omb/briefing-room/2021/09/24/new-guidance-on-covid-19-workplace-safety-for-federal-contractors/>

This issue brief was prepared by Vice President and General Counsel Peter McDonough with the assistance of ACE Assistant Vice President for Government Relations Steven Bloom (September 2021).

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effective immediately for private sector employers in the 29 states where OSHA has jurisdiction. The remaining 21 states with their own OSHA-approved plans for private sector employers will have to adopt the ETS or “just-as-effective measures” within 30 days. Similarly, in 26 states with OSHA-approved state occupational safety and health plans covering public employees, the ETS or a standard at least as protective must be adopted within 30 days.

Second, the president’s action plan requires the Centers for Medicare and Medicaid Services to require vaccination for workers and volunteers in most healthcare settings that receive Medicare or Medicaid reimbursement, including teaching hospitals.

This issue brief focuses specifically on the federal contractor requirements potentially impacting higher education institutions. It organizes some of the likely questions and available information to help inform what will be expected of colleges and universities, and required of institutions’ employees.

Spoiler alert: like our March 2021 issue brief⁵ about requiring COVID-19 vaccines on campuses, the primary objective here is to suggest a framework for analysis and assessment of an institution’s particular situation. This issue brief is not intended to provide definitive answers, which necessarily will be informed by an institution’s unique characteristics and circumstances, as well as by additional administration guidance. In addition, both the September 9 executive order and resulting September 24 guidance are ambiguous on a number of issues, and are likely generating new questions that remain to be answered.

WHAT ARE THE HEADLINES?

The executive order requires all federal executive departments and agencies, “to the extent permitted by law,” ensure that government contracts or subcontracts involving services, or construction, or relating to federal property, include a clause specifying “that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance” issued by the administration’s workforce task force.

The September 24 guidance contains firm and broadly applicable vaccine requirements for faculty and staff, including student workers, employed by colleges and universities with “covered contracts.” Each “covered contractor employee” must present proof of being fully vaccinated unless he or she can show a valid accommodation due to a disability or sincerely held religious belief or practice. In addition, the guidance directs that other faculty and staff on a campus be fully vaccinated (or given an accommodation) unless an institution can affirmatively demonstrate that its employees working on a “covered contract” will never come in contact with faculty and staff who do not work on those contracts, including in common areas such as elevators, stairwells, kitchens, dining facilities and parking garages. And the guidance requires that “all individuals” at the “covered contractor workplace” must comply with federal Centers for Disease Control and Prevention (CDC) masking and social distancing guidance.

Although the executive order and guidance speak specifically to defined “covered contracts,” the task force says that agencies can incorporate vaccination requirements into contracts that are not covered by the order, and “are strongly encouraged to do so.”⁶

WHEN WILL WE KNOW MORE?

The executive order anticipates that the task force and federal agencies will continue to issue guidance.

The Federal Acquisition Regulatory (FAR) Council has been tasked to “develop a clause that requires covered contractors performing under FAR-based contracts to comply with the Guidance” and manage the process to enable it to be incorporated into federal contracts. It has until October 8 to develop that clause and “take initial steps to implement appropriate policy direction to acquisition offices.”

5 <https://www.acenet.edu/Documents/Issue-Brief-COVID-Vaccines-March-2021.pdf>

6 <https://www.saferfederalworkforce.gov/faq/vaccinations/>

Similarly, the September 9 executive order and September 24 guidance give agencies until October 8 “to exercise any applicable authority” to develop guidance to “ensure that comparable contracts and contract-like instruments” entered into after October 15 that are not subject to the Federal Acquisition Regulation nonetheless incorporate these requirements.

WHAT TYPES OF FEDERAL CONTRACTS ARE LIKELY TO TRIGGER AN INSTITUTION IMPOSING FACULTY AND STAFF VACCINATION REQUIREMENTS?

The executive order and guidance specify that the federal contractor requirements are triggered by any new, renewal, or extension of a “[c]ontract and contract-like instrument” in excess of \$250,000⁷ if it is a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property; or a contract or contract-like instrument for services covered by the Service Contract Act,⁸ for the provision of concessions, or in connection with federal property or lands and “related to offering services for Federal employees, their dependents, or the general public.”⁹ Grants are expressly excluded, as are certain agreements with Indian Tribes, contracts performed outside the United States, and contracts solely for the provision of products.

Despite its seeming specificity, this leaves considerable room for uncertainty, particularly since agencies “are strongly encouraged to incorporate a clause requiring compliance with this Guidance into contracts that are not covered or directly addressed by the order.”¹⁰

For contracts awarded prior to October 15 where performance is ongoing, the September 24 guidance requirements must be incorporated at the point at which an option is exercised or an extension is made. For contracts awarded between October 15 and November 14, federal agencies are “encouraged” to include the requirements but are not required to do so unless the solicitation for such contract was issued on or after October 15. For new contracts awarded on or after November 14, the requirements must be incorporated. Of note, the executive order states that agencies are “strongly encouraged, to the extent permitted by law,” to take steps to include similar provisions in existing contracts.

WHICH FACULTY AND STAFF ARE SUBJECT TO THESE COVID-19 FEDERAL CONTRACTOR REQUIREMENTS?

The executive order and guidance impose requirements on two broad and likely overlapping categories of college and university employees: all full-time or part-time employees working “on or in connection with a covered contract,” **and** all full-time or part-time employees working “at a covered contractor workplace.” Because the guidance defines these terms expansively, these vaccination requirements will extend to many faculty and staff with no connection to any federal contract. Indeed, at many institutions they may cover most or all employees.

7 The executive order says that it shall not apply to “contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold, as that term is defined in section 2.101 of the Federal Acquisition Regulation.” That section 2.101 sets the simplified acquisition threshold at \$250,000. See <https://www.acquisition.gov/far/2.101>

8 The Service Contract Act is found at 41 U.S.C. 6701 *et seq.*

9 The guidance states that “[t]he term contract shall be interpreted broadly.” It defines a “contract and contract-like instrument,” to include “an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law,” such as cooperative agreements, provider agreements, service agreements, licenses and permits.

10 For example, even if an institution’s Program Participation Agreement (PPA) with the Department of Education in connection with Federal Title IV student aid is not interpreted as a “covered contract” for purposes of compliance with this federal contractor guidance, the requirements could be grafted onto PPAs in the future.

Faculty and staff working “on” or “in connection with” a covered contract

An employee will be considered to work “in connection with a contract” even if the work is not called for under the contract. All that is required is that the work is “necessary to the performance of the contract.” The guidance identifies functions such as “human resources, billing, and legal review” as examples which meet this standard.

In light of the prevalence of remote workers, it should be noted that the guidance says that an “individual working on a covered contract from their residence is a covered contractor employee, and must comply with the vaccination requirement for covered contractor employees, even if the employee never works at... a covered contractor workplace.” The residence itself “is not a covered contractor workplace,” according to the guidance, so “while in the residence the individual need not comply with requirements for covered contractor workplaces, including those related to masking and physical distancing, even while working on a covered contract.”

Faculty and staff working in a “covered contractor workplace”

The guidance potentially spreads the net of institutions’ federal contractor obligations to all corners of campus. The September 24 guidance defines “covered contractor workplace” broadly to mean any location (a) that is “controlled by a covered contractor” and (b) “at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present” during the contract performance period (other than an employee residence).¹¹

Thus, the presence of a single person working on or in connection with a covered contract turns the workplace into a “covered contractor workplace,” and extends the vaccine requirement and other safety protocols to all full-time or part-time employees working there. Significantly, the guidance takes a broad view of what the workplace actually is, for purposes of these requirements.

If an employee who works on or in connection with the covered contract works on one floor of a building, the whole building is covered by the requirements unless the contractor can affirmatively show that the covered employee will have **no** interactions with non-covered employees, including in parking garages, elevators, dining areas, etc. Likewise, if the covered employee works in one facility on a campus, the whole campus is subject to the requirements unless the contractor can show that the covered employee will have **no** interactions with non-covered employees (again, including in garages, etc.). It will be challenging, and perhaps impossible, for colleges and universities with covered federal contracts that are performed on campus to apply the requirements to less than their entire campus, due to the difficulty of establishing who covered employees working on campus will and will not interact with.

The executive order and guidance do specifically exclude employees who perform work outside of the United States.

Faculty and staff seeking accommodations

While the guidance specifies that colleges and universities must ensure that all their “covered contractor employees” are fully vaccinated and comply with other requirements, it also provides that such employees may be entitled to an accommodation if they ask for one “because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. See “Be intentional about how accommodation requests will be handled,” at page 6 below.

¹¹ The meaning of “likely to be present” is unclear. It could mean the employee is expected to work regularly at the location; or it could extend to being likely to be there for other personal reasons, such exercise or entertainment.

IF AN INSTITUTION IS A COVERED CONTRACTOR, BY WHEN MUST ITS FACULTY AND STAFF ABIDE BY THE VACCINATION REQUIREMENTS?

Covered contractor employees must be fully vaccinated no later than December 8, meaning that the last day to receive the second dose of a two-dose regime is November 24. After December 8, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, an exercised option or extended or renewed contract.

IN ADDITION TO VACCINE REQUIREMENTS, WHAT MASKING AND PHYSICAL DISTANCING REQUIREMENTS ARE APPLICABLE?

The guidance requires that “all individuals” at the (broadly defined) covered workplace must comply with federal CDC guidance for masking and social distancing. Assuming “all” means “all,” this includes students. In addition, the guidance says:

- Fully vaccinated individuals are required to wear a mask in indoor settings in areas of high or substantial community transmission, as determined by the CDC’s COVID-19 Data Tracker, but do not need to physically distance, regardless of transmission level.
- Individuals who are not fully vaccinated (e.g., because of an accommodation) must wear a mask indoors and in crowded outdoor settings, as well as during outdoor activities that involve close contact with other unvaccinated people, and maintain six feet of distance from others at all times as practicable.
- Covered contractors “should post signage at entrances to covered contractor workplaces providing information on safety protocols for fully vaccinated and not fully vaccinated individuals,” and “take other reasonable steps, such as by communicating workplace safety protocols to visitors prior to their arrival at a covered contractor workplace or requiring all visitors to follow masking and physical distancing protocols for not fully vaccinated individuals.”

HOW SHOULD A COLLEGE OR UNIVERSITY THINK ABOUT STATE OR LOCAL RESTRICTIONS THAT PRECLUDE OR INHIBIT EMPLOYEE VACCINE MANDATES AND MASKING REQUIREMENTS?

The executive branch has broad powers to regulate workplace safety. While not specifically authorized by federal legislation, this executive order and guidance have been issued under a range of presidential authority including federal statutes which cover, among other things, federal contracts.

In several states, laws or executive orders have sought to impose limits or prohibitions within their borders on employer vaccine and masking requirements.¹² On September 9, President Biden made pointed reference to “elected officials actively working to undermine the fight against COVID-19,” and said that “a distinct minority of Americans – supported by a distinct minority of elected officials — are keeping us from turning the corner.” The guidance says that the federal requirements supersede any contrary state or local law or ordinance. Whether, how, and when a state or local government could block or interfere with an institution’s compliance with these federal contractor COVID-19 requirements remains to be seen.

¹² See <https://khn.org/news/article/over-half-of-states-have-rolled-back-public-health-powers-in-pandemic>. Also see this chart prepared by the College and University Professional Association for Human Resources (CUPA-HR), which will be updated periodically on the COVID-19 Resources page: https://www.cupahr.org/wp-content/uploads/advocacy/2021-09-28-State-Vaccine-Passport-Bans-and-Apps.pdf?utm_source=Informz&utm_medium=Email&utm_campaign=Informz%20Communications

WHAT PENALTIES COULD COLLEGES AND UNIVERSITIES FACE IF THEY CHOOSE NOT TO COMPLY WITH THE COVID-19 FEDERAL CONTRACTOR REQUIREMENTS?

The executive order and guidance do not address this issue. Potentially available remedies which a federal agency might assert include cost disallowance, default termination of federal contracts, and debarment.

WHAT STEPS SHOULD FEDERAL CONTRACTOR COLLEGES AND UNIVERSITIES TAKE NOW, PARTICULARLY IF THEY DO NOT ALREADY HAVE EMPLOYEE VACCINE MANDATES AND MASKING REQUIREMENTS?

- 1. Assemble a team to assess whether the institution's federal contracts are, or are likely to be, triggers for compliance, identify legal and practical compliance options, anticipate potential compliance barriers or challenges, and remain attentive to future developments.**

As this issue brief underscores, whether, when and how a college or university must comply with the federal contractor obligations may not be obvious. Institutions' assessment and compliance with these COVID-19 federal contractor obligations will be nuanced, fact- and context-specific, and impacted by ongoing developments that are likely to include additional task force and agency guidance. Because the guidance's potentially broad net will capture faculty and staff not involved in federal contacts, as well as students (in terms of the masking and social distancing requirements), institutions must first decide whether to limit the employee obligation to what the guidance minimally requires, or whether—for fiscal, administrative, or other reasons—to subject all faculty and staff to the same obligations and include all students in the masking and social distancing protocols.

- 2. Decide who will be in charge.**

The guidance requires that covered colleges and universities must designate one or more individuals “to coordinate implementation of and compliance with this Guidance and the workplace safety protocols detailed herein at covered contractor workplaces.” That designated individual (or individuals) must ensure “that information on required COVID-19 workplace safety protocols is provided to covered contractor employees and all other individuals likely to be present at covered contractor workplaces,” and “that covered contractor employees comply with the requirements in this guidance related to the showing or provision of proper vaccination documentation.”

- 3. Implement procedures for reviewing proof of employees' vaccination status.**

The guidance requires covered institutions to “review its covered employees' documentation to prove vaccination status.” Employee attestations of vaccination status are not sufficient. Such institutions must require covered employees to present one of several specified forms of documentary proof, which can be in hard copy or provided digitally (e.g., scanned image, PDF, digital photograph).

An institution's choice to receive and **retain** vaccine documentation from employees rather than simply recording that the document has been **reviewed** and approved could have unanticipated consequences. For example, retaining certain documents may bring them within an OSHA requirement that employers maintain employee medical records for a minimum of 30 years.

- 4. Be intentional about how accommodation requests will be handled.**

The guidance says colleges and universities that are covered contractors may be required to provide an accommodation to employees who communicate that they are not vaccinated against COVID-19 or that they cannot wear a mask

- because of a disability;
- because of a medical condition, which should be treated as a request for a disability accommodation; or
- because of a sincerely held religious belief, practice, or observance.

Covered institutions should be thoughtful about developing an accommodation policy and process (including clarity about decision-makers, and the necessary resources that will be at their disposal) to enable requests for accommodations to be handled fairly and consistently. Employees should be able to easily locate and access accommodations request forms. Experience has shown that the back and forth between employers and employees regarding accommodation requests often takes far more time than anticipated; deadlines for submitting accommodation requests should be set with this in mind.