

## Update on Vaccine Requirements and Roll Out of the Path out of Pandemic Plan

Alert

10.15.2021

By Brittany Barrientos, Amy Conway, Susan Warshaw Ebner, Eric Whytsell, Zach Buchheit and Allison Kruse

We have been answering a number of questions from clients regarding the nature and scope of the requirements for COVID vaccination, testing, masking and more. Our previous alert and blogs laid out the administration's [Path out of the Pandemic](#), the overarching directive outlining the federal government's vaccination plan across government and industry sectors. This included a directive to the Occupational Health and Safety Administration directive (OSHA) to develop a broad-ranging workplace standard requiring vaccination or weekly testing at workplaces with more than 100 employees, and a directive for the Centers for Medicare and Medicaid Services (CMS) to issue a vaccination mandate for healthcare workplaces that receive Medicare or Medicaid Funding. The Path out of the Pandemic plan was laid out in parallel with the [Executive Order 14042](#) (EO), which requires [government contractors' and subcontractors'](#) employees to be fully vaccinated by December 8, 2021, unless legally exempt.

Since then, much has happened. Executive Order 14042 was expanded via [guidance](#) from the Safer Federal Workforce Task Force, and both OSHA and CMS sent rules to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) for review; issuance of both standards is imminent. Federal agencies are rolling out the interim clauses to kick off contractors and subcontractors compliance obligations. As the dust begins to settle and the Path out of the Pandemic plan's framework becomes more tangible, we have been answering questions from across the country. Below are some bullet points for employers to start thinking about and questions you should be asking:

# Update on Vaccine Requirements and Roll Out of the Path out of Pandemic Plan

## OSHA

- OSHA was directed to develop a standard requiring either vaccination or weekly testing for employers with more than 100 employees. This is expected to impact more than 80 million employees, including employers who are not subject to (or fully covered by) the federal contractor requirements. Employers should independently evaluate each requirement to determine applicability of the entire workforce.
- Development of the ETS is a statutory-prescribed process, and results in a legally enforceable regulation. Violating the regulation will subject employers to civil penalties. On October 11, OSHA announced it submitted the standard to OIRA. OIRA has 90 days to review (unless extended or expedited) and return the standard to OSHA. If OIRA determines the standard complies with law, it can be signed and submitted to the Federal Register for publication. The standard will become effective upon publication.
- OSHA's ETS is expected to include a vaccination or testing requirement. Employers should evaluate the percentage of their workforce that is unvaccinated and may be subject to testing protocols. From there, employers should evaluate logistics and budgetary issues around testing unvaccinated employees. These could include test procurement and verification, timing of testing, type of tests available, evaluations regarding compensable time, processes for handling accommodation requests, and other issues that are sure to arise.
- OSHA's ETS will likely build off existing guidance. Employers should evaluate existing policies to confirm they are up to date with current [OSHA](#) and CDC guidance. Employers should also confirm policies are being implemented and enforced, and begin discussions with affected union(s) if those are not already underway.

## Executive Order 14042 Rollout

- Which executive branch entities are not covered? Beyond identifying coverage of "Executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A)," no further guidance on has yet been provided. This is an outstanding question that federal contractors should assess.
- Several agencies issued FAR Class Deviations to implement the EO and the Safer Federal Work Place Task Force Guidance. All told, to date [20 agencies](#) have issued FAR Class Deviations to address the EO requirements: Consumer Product Safety Commission, Department of Commerce, Department of Interior, Department of State, Department of Veterans Affairs, Environmental Protection Agency, Federal Election Commission, GSA, Health and Human Services, Millennium Challenge Corporation, NASA, National Science Foundation, Pension Benefit Guaranty Corporation, Securities and Exchange Commission, Small Business Administration, US Agency for Global Media's, US Department of Agriculture, US Department of Justice, and US Department of the Treasury.

# Update on Vaccine Requirements and Roll Out of the Path out of Pandemic Plan

- On October 13, 2021, the GSA hosted an industry day on its implementation of the EO and its FAR Class Deviation. While many questions still remain unanswered, some key points from this day illustrate the serious intent of GSA to enforce compliance with the rule and its limited interest in addressing contractor concerns with impacts:
  - Recognition that the implementing clause is being put into effect by October 15, 2021, less than the 30-day procurement rulemaking standard, something that has not happened before.
  - Covered contracts and contract-like instruments are to include contracts above the Simplified Acquisition Threshold (SAT), \$250,000, but GSA strongly encourages application of the clause to contracts and contract-like instruments at or below the SAT.
  - The clause flows down to subcontracts over \$250,000, but not those solely for products, though “products” is not defined.
  - GSA states that no certification or attestation is required by its rule. However, there are False Claims Act cases that suggest noncompliance with material provisions of a contract can be the basis for a false claim under an implied certification theory.
  - GSA does not appear likely to consider equitable adjustments as part of the process for bilateral modification of its Federal Supply Schedule (FSS) contracts to include the clause. However, it defers whether a request can be made and recovered where the contractor can show a specific adverse impact at the agency level under a specific contract.
  - GSA has encouraged its contracting officers to amend pending solicitations before award to include the clause. It has encouraged them to also allow for proposal revision.
  - Agencies are looking to GSA to implement the clause in all its FSS and multiple award contracts so that orders will automatically be covered by the clause. Although some agencies will insert their own clauses as well at the task order level.
  - GSA will use its website tools on or after November 15, 2021, to hide FSS and IDIQ contracts that have not accepted the modification to include the clause.

## Labor and Employment

- Whether covered by Executive Order 14042, the impending OSHA ETS, or both, it is imperative that employers begin the process of collecting employee vaccination information as soon as possible. To be fully vaccinated by the EO-established federal contractor December 8, 2021 deadline, for example, an employee must receive their final shot by November 24, 2021. Employees need time to make these appointments.
- The guidance does not specify what accommodations should be granted (or denied) to employees who have qualifying religious or disability (including medical) reasons for an exemption from the vaccination

# Update on Vaccine Requirements and Roll Out of the Path out of Pandemic Plan

requirement. Employers should engage in the interactive process to assess what accommodations would be reasonable without imposing an undue hardship. Potential accommodations could include regular COVID-19 testing, masking, social distancing and/or remote work. Employers should specify a date well in advance of December 8, 2021, by which accommodation requests should be received for planning purposes.

- The guidance does not require that employees who are not vaccinated by the December 8, 2021 deadline be immediately fired. Employers will need to be thoughtful about how they handle employees who are unvaccinated and do not have a qualifying exemption under the law. Contractors should work with legal counsel on these issues.
- Guidance is being updated regularly on these topics. Contractors should monitor the [Safer Federal Workforce Task Force FAQs](#).

## State and Local Government

- With all the complexity, uncertainty, and as yet unanswered questions surrounding the various federal vaccine mandate requirements and agency-specific implementations of them, it can be easy to overlook state and local requirements that may establish different or more extensive rules. For example, the Los Angeles Unified School District [vaccination rules](#) apply to contractor and subcontractor personnel who provide services on District property or directly to District students and require contractor certification compliance. In contrast, some government facilities, including public universities, have adopted policies that require proof of vaccination from every person who works on site—not just a certification from their employer.
- The guidance states that its requirements supersede any contrary state or local law or ordinance. But it also provides that nothing in its contents “shall excuse noncompliance with any applicable state law or municipal ordinance establishing more protective workplace safety protocols than those established under th[e] Guidance.”
- Federal contractors should carefully track all potentially applicable vaccine-related requirements imposed in jurisdictions in which their employees operate and analyze the relationship between the requirements before establishing a vaccination compliance program or global policies for their personnel. Companies operating in multiple jurisdictions with different requirements will need to weigh the relative wisdom of adopting a single vaccination policy for all employees versus attempting to apply different requirements jurisdiction by jurisdiction.
- States are also rolling out broadly-applicable executive orders and state laws prohibiting vaccine mandates. Texas [Executive Order GA-40](#) prohibits entities from compelling individuals to receive a COVID-19 vaccine if they object “for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19.” Montana’s legislature passed [HB 702](#),

# Update on Vaccine Requirements and Roll Out of the Path out of Pandemic Plan

purporting to make requiring a COVID-19 vaccine “an unlawful discriminatory practice.”

## Preemption

- As more states and localities issue their own rules regarding vaccines, many employers are questioning whether the federal guidance issued pursuant to the president’s executive order and the impending federal OSHA and CMS regulations are enforceable. Generally speaking, under the Supremacy Clause, Congress may preempt a state law through federal legislation, either through express language or implicitly through field preemption (the scheme of federal regulation is so pervasive that it can be inferred Congress left no room for the states to supplement it) or conflict preemption (compliance with both federal and state regulations is a physical impossibility). These are detailed analyses and employers should consult with counsel as opposed to making their own determinations about violating one law in favor of another.
- As illustration, when evaluating the anticipated OSHA standard, OSHA is a federal law that applies directly in 29 states that do not have OSHA state plans. In those states, the federal OSHA standard preempts a state law that regulates the same subject matter (e.g., prohibiting employer vaccination mandates). However, it is important to note that while both Texas and Montana are federal OSHA states, even an OSHA standard that has a vaccine or weekly testing requirement does not conflict with the existing Texas executive order or Montana laws.
- In contrast, the federal contractor guidance requires relevant employees be subject to a vaccination mandate though, as described above, with qualifying accommodations. This is a tricky analysis, as precisely which prime or subcontractor employees are covered, and precisely what constitute “performance under” or “in connection with” a government contract or contract-like instrument has not been well-defined. The clauses and activities relating to the actual federal contracts and contract-like instruments must be evaluated on a case-by-case basis. There are also practicalities to consider when dealing with government contracts, and they may be appropriate for negotiation or workaround. Our attorneys can assist with these legal and practical analyses.

## Cases Pending

The federal employee and federal contractor vaccine mandates are already being challenged in federal court and, while the OSHA standard is not yet released, it will inevitably be challenged as well. However, these are not the first cases to address vaccine mandates, but they may raise unique issues as matters proceed. Below is a round-up of some of the key cases.

- In its first foray into COVID-19 vaccine mandates, the Supreme Court declined to block a state university’s rule requiring students, faculty, and staff to be vaccinated. In *Klaassen v. Trustees of Indiana University*, Indiana University students alleged that the university’s requirement that they either be

## Update on Vaccine Requirements and Roll Out of the Path out of Pandemic Plan

vaccinated or wear masks and be tested twice a week violates the Due Process Clause. The students' request for a preliminary injunction was denied by a federal district court and the Seventh Circuit, which noted that medical requirements like vaccinations are routinely mandated by colleges, that the university's policy allows for exemptions, and that students are free to attend schools without such requirements. In finding that this policy did not violate Due Process, the Seventh Circuit relied on a 1905 case allowing states to require vaccination against smallpox. The Court determined: "Each university may decide what is necessary to keep other students safe in a congregate setting ... Vaccination protects not only the vaccinated persons but also those who come in contact with them, and at a university close contact is inevitable." The Supreme Court denied *certiorari*.

- In Texas, 117 employees brought wrongful termination and public policy claims against their employer, a private hospital in Houston, after the employer announced a policy requiring employees to be vaccinated against COVID-19. This lawsuit was heard before the FDA issued its full approval of the Pfizer vaccine and the vaccine was still being used under an Emergency Use Authorization. The case was dismissed by the U.S. District Court for the Southern District of Texas. The court refused to consider the plaintiffs' allegations that vaccines are experimental and dangerous, because Texas law only protects employees from termination for refusing to commit illegal acts with criminal penalties. In finding that the public policy claims should be dismissed as a matter of law, the court stated that the hospital's vaccination policy did not amount to coercion since plaintiffs "can freely choose to accept or refuse a COVID-19 vaccine," but also that they "will simply need to work somewhere else" if they refuse. "Every employment includes limits on the worker's behavior in exchange for his remuneration," the Court stated. "That is all part of the bargain." The case is pending appeal.
- Six United Airlines employees who refused to comply with a COVID-19 vaccine mandate brought a class action lawsuit, claiming their employer discriminated against them by denying religious or medical accommodations and instead placing them on indefinite unpaid leave. The parties had previously stipulated that United would temporarily refrain from placing on leave any exempted employees who refused the vaccine. But with the stipulation about to expire, a federal district court issued a temporary restraining order to keep any employees who were granted medical or religious exemptions on United's payroll while the court hears arguments on a preliminary injunction. The order also precludes United from denying any requests for religious or medical exemptions from the vaccine mandate due to timeliness (i.e., because the requests were submitted after the August 31, 2021 deadline).

As you can see from the above, a lot is happening in this area and on multiple fronts. We are following events closely. For questions about this blog, contact the authors or your Stinson counsel.

For more information on the roll out and implementation of the Path out of Pandemic Plan, including vaccination and government contracting requirements, please contact [Brittany Barrientos](#), [Zach Buchheit](#), [Amy Conway](#), [Susan Warshaw Ebner](#), [Alisa Ehrlich](#), [Allison Kruse](#), [Erin Naeger](#), [Greta Bauer Reyes](#),

**STINSON**

STINSON LLP \ STINSON.COM

# Update on Vaccine Requirements and Roll Out of the Path out of Pandemic Plan

[Stephanie Scheck](#), Roddy Stieger, [Eric Whytsell](#) or the Stinson LLP contact with whom you regularly work.

## CONTACTS

Brittany Barrientos

Zachary T. Buchheit

Amy B. Conway

Susan Warshaw Ebner

Eric Whytsell

## RELATED CAPABILITIES

Corporate Finance

Environmental & Natural Resources

Government Contracts & Investigations

Labor, Employment & Benefits

Real Estate & Public Finance

STINSON

STINSON LLP \ STINSON.COM