

Federal Contractors and Biden's Vaccination Mandate

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Overview: On September 9, 2021, President Biden announced a new COVID-19 “Path Out of the Pandemic” six-step plan which requires certain federal contractors and subcontractors, among others, to ensure that their employees are vaccinated against COVID-19. This memo provides a summary of Executive Order 14042 and outlines the potential impact this executive order could have on snack food manufacturers and distributors.

Despite a shaky legal foundation, Executive Order 14042 requires executive agencies and departments to include a clause in some federal contracts and subcontracts mandating compliance with “guidance” provided by the Safer Federal Workforce Task Force. While we anticipate that this “guidance” will require vaccinations unless employees receive an approved exemption and will likely eliminate testing options found in earlier executive orders and guidance, there is almost certainly going to be litigation that could delay or stop the federal contractor vaccination mandate.

Which Contracts Are Subject to Executive Order 14042's Requirements? On its face, the executive order applies to a new government contract, a new contract solicitation, an extension or renewal of an existing contract, and the exercise of an option on an existing contract as well as a subcontract of any tier but only if certain conditions are met:

What federal entity has the contract? The contract must be with a federal executive agency (such as the Department of Defense, including commissaries and PXs), department (such as the Army or Navy), independent establishment (such as the Environmental Protection Agency or the Small Business Administration but maybe not the United States Postal Service), and wholly-owned Government corporation (such as the Export-Import Bank or the Tennessee Valley Authority).

How much is the contract worth? The contract must be valued above the “Simplified Acquisition Threshold,” which refers to the monetary threshold below which federal agencies can use simplified purchasing mechanisms. Currently, this threshold is \$250,000. So, any covered contract above \$250,000 could trigger executive order 14042's vaccine mandate.

What is the main purpose of the contract? A contract to sell or supply snack foods to a federal agency does not trigger this executive order. Only certain executive agency contracts of above \$250,000 mandate compliance with executive order 14042, including

- A contract for services (meaning the contract's purpose is to perform a service (such as restocking vending machines) as opposed to providing products or supplies (like snacks) to a federal customer;
- A contract for services covered by the Service Contract Act (such as a contract using mechanics or tradespeople to service or maintain vending machine which is subject to prevailing wages and fringe benefits);

- A contract for construction or a leasehold interest in real property;
- A contract for concessions (such as a contract to run a food service in a National Park cafeteria); and/or
- A contract in connection with federal property or lands related to offering services to federal employees, their dependents, or the general public (such as seasonal recreational ski services offered on federal property).

Which contracts are not covered? The executive order does not apply to the following types of contracts:

- a non-executive agency contract valued at or below the Simplified Acquisition Threshold (currently \$250,000)
- a grant or federal financial assistance agreement (like Medicare/Medicaid or some loans);
- a contract with Indian Tribes;
- a contract that is performed outside the United States or its outlying areas; and
- a subcontract solely for the provision of products.

Which employees must be vaccinated? Workers “performing on” or “in connection with” a covered contract must be vaccinated. An employee performs services “on” a contract when he or she performs a services-related task required by the contract, like furnishing, installing, and stocking vending machines. Under such a contract, delivery route personnel and employees servicing the machines would be covered as well. In contrast, an employee working on a contract to provide a product -- like bagged or wrapped snacks -- or an employee who merely delivers goods to a designated storage agency is not “performing on” a services contract. It remains to be seen whether merchandising activities are “services” that could create coverage under this executive order.

An employee will perform “in connection with” a contract when he or she performs services not required by the contract but necessary to the performance of the contract, like a payroll clerk maintaining prevailing wage information under the Service Contract Act or a security guard monitoring a construction site. If President Biden’s recent minimum wage executive order is a guide (and we believe it is), the “in connection with” trigger will not be pulled unless such an employee spends at least 20% of his or her workweek performing “in connection with” the covered contract. Keep in mind, too, that employers must continue to comply with more restrictive federal, state, and/or local COVID-19 protections that may impose vaccination requirements upon more employees than those performing “on or in connection with” a covered federal contract or subcontract.

What Happens Next? Federal contractors and subcontractors will get further guidance from the Safer Federal Workforce Task Force by September 24. The executive order contemplates that the new vaccine clause will start appearing in some federal contracts by October 15.

Nevertheless, many questions are yet unanswered about the scope of executive order 14042, such as whether the vaccination mandate includes remote employees, whether federal contracting officers will insist on including a vaccination clause in small contracts valued at or below \$250,000 or those with non-executive agencies, and whether President Biden even has the legal

authority to impose this vaccination mandate without complying with rulemaking obligations.
Stay tuned and buckle up!

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