



AUTHOR

Marlene C. Nowlin, Esq.

CONTACT ATTORNEYS

Marlene C. Nowlin, Esq.
mnowlin@ftblaw.com

Chad T. Wishchuk, Esq.
cwishchuk@ftblaw.com

VACCINE MANDATES AND YOUR PROJECTS

Construction contractors and subcontractors are currently facing a barrage of evolving COVID-19 vaccine and testing mandates issued by federal, state, and local governmental agencies. MCAC has teamed up with the law firm of Finch, Thornton & Baird, LLP, to sort through the mandates and provide guidance on how members should navigate them.

SECTION ONE: THE MANDATES

State and Local School District Mandates

On August 11, 2021, the California Department of Public Health (CDPH) issued a State Public Health Officer Order (CDPH Order) requiring K-12 school districts to verify the vaccination status of all K-12 school workers and conduct weekly COVID-19 testing of workers who are not fully vaccinated. In response to the CDPH Order, California school districts, including the Los Angeles Unified School District (LAUSD), issued COVID-19 vaccines and/or testing mandates to their contractors, some with a deadline to comply of November 15, 2021. Other districts have imposed or are expected to impose vaccine/testing mandates on contractors and subcontractors.

Federal Mandates

On September 9, 2021, the White House issued its “Path Out of the Pandemic: President Biden’s COVID-19 Action Plan” which included two parts:

1. An instruction to the Department of Labor’s Occupational Safety and Health Administration (OSHA) to issue an Emergency Temporary Standard (“ETS”) requiring all employers with 100 or more employees to ensure all employees are fully vaccinated or test negative for COVID-19 on a weekly basis. In January, the U.S. Supreme Court stayed the ETS, and federal OSHA is not currently implementing or enforcing it.
2. Executive Order 14042 which requires certain federal government contractors to comply with guidance issued by the

Safer Federal Workforce Task Force. On September 24, 2021, the Safer Federal Workforce Task Force issued COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (“Guidance”). The Guidance mandates COVID-19 safety protocols including vaccinations for employees who work on or in connection with certain government contracts, whether or not the employees work on a federal jobsite. In December, a federal judge issued an injunction of Executive Order 14042’s vaccine mandate.

Some frequently asked questions and answers about these mandates follow below.

SECTION TWO: FREQUENTLY ASKED QUESTIONS STATE AND SCHOOL DISTRICT MANDATES

Q1. CAN A SCHOOL DISTRICT ADD A VACCINE OR TESTING MANDATE TO A PROJECT ALREADY IN PROGRESS WITHOUT CONTRACTOR APPROVAL?

A1: Probably. If a district unilaterally applies a mandate to your existing project or contract, you should comply with the contract notice provisions and, with the assistance of counsel, reserve all your rights to resulting additional costs, including testing. This can be done in various ways including notification that there will likely be delays and disruption due to, among other things, potential cutting of workforce and the imposition of additional work and restrictions. Increased costs, delays, and disruptions could be associated with complying with a mandate.

Q2. CAN CONTRACTORS OBJECT TO ADDED COSTS, DELAYS, AND/OR DISRUPTIONS CAUSED BY COVID-19 MANDATES?

A2: Yes. Agencies have different mandates and each project may be subject to different contract provisions. An existing contract with an agency, for example, may have terms that could be interpreted to entitle contractors to recover for time, delays, disruptions, and/or costs imposed by an agency’s COVID-19 vaccine and/or testing mandate. Consult with your legal counsel to determine how best to respond to a school district or other governmental agency vaccine or testing mandate.

Q3. DO THE REQUIREMENTS OF THE CDPH ORDER APPLY TO ALL CONTRACTORS AND SUBCONTRACTORS INCLUDING HAULERS AND SUB-HAULERS?

A3: Not necessarily. Although school districts are required to follow the CDPH Order, contractors and subcontractors may be able to object to a district’s COVID-19 vaccination and testing requirements based on the specific situation, including workers’ specific duties, locations, and time spent at school locations. Some school districts are attempting to force all contractors and subcontractors to comply with vaccine and/or testing requirements by claiming that all contractors and subcontractors are working in “school settings” regardless of their duties, location of services, and time spent at those locations. Such school districts are relying on the CDPH Order’s broad definition of “workers” which includes “all paid and unpaid adults” serving in public and private “school settings” and other broad language.

Despite this broad language, you should assess your specific circumstances including contractual duties, access to school facilities, and time spent at schools, and prepare objections to vaccine and/or testing mandates if warranted.

Q4. CAN CONTRACTORS LEGALLY ASK WORKERS IF THEY ARE VACCINATED?

A4. Yes, employers are authorized to ask their employees about vaccination status, and employees can decline to provide this information. Similarly, to comply with the CDPH Order, contractors can ask their subcontractors to certify that the subcontractor’s workers are vaccinated and/or tested for COVID-19.

Cal/OSHA’s Revised COVID-19 Emergency Temporary Standards specifically requires each employer to ask about and document worker vaccination status in order to exempt fully vaccinated workers from certain regu-

latory requirements such as face coverings. Also, employers have a duty of care under federal OSHA and Cal/OSHA regulations and standards to provide a safe workplace for workers. So these inquiries are justified. Moreover, employers are permitted to ask for the COVID-19 vaccination status of employees and subcontractors’ workers by the Equal Employment Opportunity Commission and the California Department of Fair Employment & Housing.

The type of verification process employers should use will depend on the specific vaccine mandate. Generally, acceptable documentation includes digital (e.g., photos or PDFs) or hard copies of the following:

1. Record of immunization from a healthcare provider or pharmacy;
2. COVID-19 Vaccination Record Card;
3. Medical records documenting the vaccination;
4. Immunization records from a public health or state immunization information system; and
5. Other official documentation detailing the type of vaccine administered, date(s) of administration, and the name of the healthcare professional or clinic site that administered the vaccine.

Q5. HOW SHOULD VACCINATION AND TESTING RECORDS BE MAINTAINED?

A5. Employers must maintain all vaccination and testing-related records in separate files and cannot disclose such records or information to any third party unless required by law or an employee has expressly consented in writing. All vaccination information should be held strictly confidential.

Q6. DOES ASKING FOR COVID-19 VACCINATION OR TESTING INFORMATION VIOLATE HIPAA?

A6. No. Construction contractors are generally not covered by HIPAA. Only “Covered Entities” are subject to HIPAA, such as health care providers, health plans, and health care clearinghouses. These “Covered Entities” may not disclose protected health information (“PHI”) unless permitted by HIPAA. Unless an employer is a “Covered Entity,” it is not subject to HIPAA’s restrictions on disclosures of PHI. For example, it would be a HIPAA violation for an employee’s health-care provider to disclose vaccination status unless an employee authorized the healthcare provider to make the disclosure.

Q7. CAN EMPLOYEES GET AN EXEMPTION FROM A VACCINE OR TESTING MANDATE?

A7. Yes, in certain circumstances employers may be required to provide an accommodation to employees who communicate they are not vaccinated against COVID-19 because of a disability (which would include medical conditions) or a sincerely held religious belief, practice, or observance. Employees should be advised of their right to request an accommodation if they believe they are exempt from a vaccine or testing mandate based on a disability, medical condition, or sincerely held religious belief.

Upon receipt of an employee's accommodation request, employers should review and consider what, if any, accommodation it should offer. The vaccine exemption process should be well documented, including an accommodation request form. Documentation is necessary to be prepared for a governmental audit, OSHA or Cal/OSHA enforcement action, or possible claim under the False Claims Act.

FEDERAL MANDATES

On September 9, 2021, the White House issued its "Path Out of the Pandemic: President Biden's COVID-19 Action Plan" which included two parts:

1. An instruction to the Department of Labor's Occupational Safety and Health Administration (OSHA) to issue an Emergency Temporary Standard ("ETS") requiring all employers with 100 or more employees to ensure all employees are fully vaccinated or test negative for COVID-19 on a weekly basis. On January 13, 2022, the United States Supreme Court issued a stay of the ETS which prohibits federal OSHA from implementing or enforcing it.
2. Executive Order 14042 which requires certain federal government contractors to comply with guidance issued by the Safer Federal Workforce Task Force. On September 24, 2021, the Safer Federal Workforce Task Force issued COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors ("Guidance"). The Guidance mandates COVID-19 safety protocols including vaccinations for employees who work on or in connection with certain government contracts, whether or not the employees work on a federal jobsite. "(See https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf)

On December 7, 2021, a United States District Court issued a nationwide injunction which stops enforcement of Executive Order 14042's vaccine mandate for federal contractors and subcontractors. On January 21, 2022, the District Court provided a further explanation of the effect of the nationwide injunction.

Q8. DO CONTRACTORS HAVE TO COMPLY WITH THE OSHA ETS NOW?

A8. Not yet. On January 13, 2022, the United States Supreme Court issued a stay of the OSHA ETS holding that enforcement of the ETS is stayed pending further review by the Sixth Circuit Court of Appeals, and, possibly, by the Supreme Court. This means the OSHA ETS remains blocked pending further review by the Courts. It will be up to the Sixth Circuit and thereafter, the United States Supreme Court, to make a final decision regarding the many complex issues surrounding the validity and enforceability of the OSHA ETS.

Q9. WHAT SHOULD EMPLOYERS DO IN LIGHT OF THE STATUS OF THE OSHA ETS?

A9. Based on the Supreme Court's majority opinion, it appears unlikely employers will have to comply with the OSHA ETS. But if compliance is ultimately required, 100-plus employers have more time to do so. It's also possible OSHA will issue a different rule, or a permanent rule with other requirements. California contractors subject to state, local, or project COVID-19 vaccination and testing requirements still have to comply with those requirements. Contractors should consider all applicable mandates and ongoing challenges they face due to COVID-19 and consult with counsel regarding how to proceed and whether to implement their own vaccine and/or testing policies.

Q10. DO FEDERAL CONTRACTORS HAVE TO FOLLOW MANDATES ON FEDERAL PROJECTS NOW?

A10. Not yet as to the vaccine mandate. Yes, as to Executive Order 14042's other mandates. On December 7, 2021, The United States District Court for the Southern District of Georgia ("Georgia District Court") issued a nationwide injunction which stops enforcement of Executive Order 14042's vaccine mandate for federal contractors and subcontractors.

The Georgia District Court's injunction stops enforcement of Executive Order 14042's vaccine mandates in all states and territories

of the United States during the pendency of the District Court case or until the District Court issues a different order. On January 21, 2022, the Georgia District Court issued an order explaining that the nationwide injunction enjoined the vaccine requirement only but not the other Guidance requirements such as masking, physical distancing, travel, quarantine, and other workplace safety protocols including the requirement that federal contractors covered by Executive Order 14042 designate a person responsible for overseeing compliance with these requirements. It is now clear that only the vaccine requirement was enjoined nationwide by the Georgia District Court.

As a result of the January 21, 2022 Order, federal contractors covered by Executive Order 14042 should implement plans to meet the numerous non-vaccine requirements of the Guidance. It is possible, however, that in the future, other federal courts considering preliminary injunctions of Executive Order 14042 may stop non-vaccine requirements of the Guidance from taking effect.

Q11. WILL EXECUTIVE ORDER 14042'S FEDERAL CONTRACTOR VACCINE MANDATES TAKE EFFECT IN THE FUTURE?

A11. Possibly. Appeals are pending in the Fifth, Sixth, Eighth, and Eleventh circuits regarding the Georgia District Court's injunction. Narrower appeals are pending in other federal courts in Kentucky and Louisiana.

Even though the Georgia District Court's injunction currently stops the federal government from enforcing vaccine mandates for federal contractors and subcontractors, a different order may issue from the Georgia District Court, or another federal court. It will be up to the federal courts and thereafter, the United States Supreme Court, to make a final decision regarding the enforcement of Executive Order 14042's vaccine mandates for federal contractors and subcontractors. In the event Executive Order 14042's vaccine mandate survives all current legal challenges, contractors on federal projects would be

required to comply with the Guidance issued by the Safer Federal Workforce Task Force. The Guidance includes the vaccine mandate and applies to contractors when a federal agency issues "implementing clauses" to be added to a contractor's solicitations and/or contract. Federal agencies would be required to issue "implementing clauses" for:

1. New contracts awarded on or after November 14, 2021, from solicitations issued before October 15, 2021;
2. New solicitations issued on or after October 15, 2021, and contracts awarded pursuant to those solicitations;
3. Extensions or renewals of existing contracts and orders awarded on or after October 15, 2021; and
4. Options on existing contracts and orders exercised on or after October 15, 2021.

Pursuant to Executive Order 14042, covered contractors were required to be fully vaccinated no later than January 18, 2022. Due to the pending litigation, that requirement has not taken effect. For new federal contracts, employees would have to be fully vaccinated by the first day of the period of performance.

If you have a federal project that falls under one of these four categories, you may receive an implementation clause and be required to comply if Executive Order 14042 takes effect. ■

FTB regularly advises employers regarding compliance with vaccine and testing mandates and prepares implementing documentation including objections to such mandates based on existing contractual terms, increased costs, delays, and disruptions associated with compliance. Please contact Marlene C. Nowlin, Esq. with your questions at (858) 737-3100.

LEGAL DISCLAIMER These materials are general in nature and do not create a client-attorney relationship. This does not constitute guarantees, warranties, or predictions regarding the outcome of your legal matter. If you have any questions concerning attorney advertising rules, please contact Finch, Thornton & Baird, LLP at 858.737.3100.



MCAC is the "411" center for mason contractors on legislation, regulations, safety issues, and building codes. The Association is headquartered in the state capital of Sacramento, CA.

mca-ca.org | julie@mca-ca.org | 916.966.7666