



Mandatory Vaccines and Testing Federal EO and OSHA ETS

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CONVENTION EDUCATION

Path out of the Pandemic

President Biden introduced his 6-prong plan to combat COVID-19 through the Fall of 2021:

1. **Vaccinate the unvaccinated**
2. Protect the vaccinated from the unvaccinated
3. Keep schools safely open
4. Increase testing & mask requirements
5. Protect economic recovery
6. Improve care for those who become infected w/ COVID-19



Vaccinating the Unvaccinated

5 Goals within the Vaccination Prong:

1. “Hard” vaccine mandate for healthcare workers at facilities receiving Medicare/Medicaid reimbursement
2. “Hard” vaccine mandate for educators in Head Start programs (encourages governors to set mandates for schools)
3. Encouraged entertainment venues to require patrons to be vaccinated or show a negative test for entry



Vaccinating the Unvaccinated

4. “Hard” vaccine mandate for fed gov’t employees and contractors

5. “Soft” vaccine mandate for employers with 100+ employees, via another Fed OSHA COVID-19 Emergency Temporary Standard



Executive Order for Vaccine Mandate for Federal Workers and Contractors



Who is Covered by the EO?

- **Covered contractor**: Prime contractor or subcontractor at any tier that is party to a covered ***contract or contract-like instrument*** (applies to covered contractors regardless of size of the business)
- **Covered contractor employees**: Full- or part- time employees of a covered contractor ***working on or in connection with a covered contract*** OR ***working at a covered contractor workplace***



Who is Covered by the EO?

- **Work “on a covered contract”**: Employees performing a service called for by covered contract from any US location, including their homes, even if employee never works at a covered contractor workplace
- **Work “in connection w/ a covered contract”**: Employees w/ duties necessary to the performance of the covered contract, but who are not directly engaged in performing the specific work called for by the covered contract; e.g., HR, billing, legal review, etc.



Who is Covered by the EO?

- **Covered contractor workplace:** Location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract, including:
 - contractor or subcontractor outdoor workplaces
 - all employees working there, **even** not on or in connection with a covered contract



What is a covered contract?

- ***New contracts*** – requirements must be incorporated into contracts awarded on or after 11/14/21
- ***On-going contracts awarded prior to 10/15/21*** – requirements must be incorporated at the point at which an option is exercised, or extension is made
- Does NOT include subcontracts solely for provision of products



Fed Contractor EO – Vaccination

Fed contractors and subcontractors with a covered contract must:

- Require all covered contractor employees to be ***fully vaccinated by no later than 12/08/21***
- Review covered employees' documentation to verify vaccination status – ***self-attestation is not an acceptable substitute***



Fed Contractor EO – Vaccination

- Exceptions:
 - When an employee is legally entitled to an accommodation
 - There is an approved urgent, mission-critical need, and the employee gets vaccinated w/in 60 days of beginning work and follows masking/ distancing requirements



ADA Exemptions

- Per EEOC, employers should ordinarily presume employee's request for religious accommodation is based on a "*sincerely held religious belief*" unless there exists an objective basis to question the sincerity
 - Personal anti-vaccination positions generally will not be sufficient to establish a sufficient sincerely held religious belief
- Employers must provide a reasonable accommodation, unless it would pose an undue hardship under Title VII or the ADA
- Undue hardship standard
 - Under Title VII is "more than *de minimis* cost/burden on employer"
 - Under ADA is "significant difficulty or expense"



Federal Contractor EO - Masks and Distancing

- Ensure all individuals at a covered contractor workplace, including covered contractor employees and visitors, comply w/ CDC masking/distancing guidance
- **Exceptions:**
 - legally-entitled accommodations
 - alone in a room with a closed door
 - Eating or drinking while distancing
 - engaged in activity that may make the mask wet, or engaged in high-intensity activities making it hard to breathe



Federal Contractor EC – COVID-19 Coordinator

- Designate a person or persons to:
 - Coordinate COVID-19 workplace safety efforts at covered contractor workplaces
 - Ensure info on required COVID-19 safety protocols is provided to covered contractor employees and all other individuals likely to be present at covered contractor workplaces
 - Ensure compliance with vaccine-mandate requirement



Federal Contractor EO – Other Considerations

- Covered contractors are not required to provide **onsite vaccinations**, but should ensure employees are aware of convenient opportunities to be vaccinated
- Covered contractor employees who have had a **prior COVID-19 infection** are still required to be vaccinated
- Covered contractors should post **signage** at entries to covered contractor workplaces providing info and instructions on safety protocols for fully vaccinated and unvaccinated individuals, including protocols on masking and physical distancing
- The requirements are promulgated pursuant to Federal law and **supersede any contrary State or local law or ordinance**



NECA Referral and Apprenticeship Issues

- **Covered contractor employees**: Full- or part- time employees of a covered contractor **working on or in connection w/ a covered contract** OR **working at a covered contractor workplace**
- **Creates a particular problem for NECA and a transient workforce**



Fed OSHA's ETS: How will the ETS Impact NECA Members?



What we know now

- ETS expected by the end of October 2021.
- Covered employers will be required to:
 - Provide ***paid time off*** to employees to get vaccinated and recover from ill-effects of vaccine
 - Mandate that employees either:
 - Get fully vaccinated; or
 - Produce a negative test result at least weekly before going in



Who is covered by ETS?

- Employers with 100+ employees
- Employee count ***likely*** company-wide, but justification for either:
 - *By Establishment* – Significant outbreaks only occur where many people are present; Most recent OSHA reg impacted by employee count (E-Recordkeeping) is based on # at each establishment
 - *Enterprise-wide #* – As a public health initiative more so than a traditional workplace safety reg, focus is likely on largest possible # of workers; Other reg exemptions based on employer count company-wide (e.g., Injury and Illness Recordkeeping)



Many unanswered questions

- Recordkeeping and reporting. Will there be guidance on the all-important recordable incident issue? If mandated, does each illness or adverse reaction result in a recordable incident?
- Who pays for testing? Time off for testing?
- Can employer choose vaccine mandate or testing, or may employee choose?
- Employer policies and training
- Social Distancing
- Remote work



State OSHA Rules

- Only 27 Fed OSHA states
- VA OSHA, Cal OSHA and many others will have additional requirements
- Need to be mindful of different or more stringent state requirements



Impact on Bargaining and Existing NECA contracts

- NECA contractors should look to local Chapter to bargain effects of the EO and the ETS
- Best practice would be to wait for ETS to come out
- Develop a plan with local legal counsel to reopen existing job contracts or use the change order process to cover the unfunded federal mandate



What is NECA doing to impact the process?



Conn Maciel Coalition

- NECA National has joined a large coalition of employers and national associations lead by Conn Maciel Carey, a prominent labor, employment and OSHA law firm - <http://www.connmaciel.com/>
- The coalition will be very engaged in the EO and OSHA rulemaking process and will seek to impact the directives to protect employers and NECA contractors



Monitoring Litigation

NECA will monitor all litigation that comes out on these issues, for example:

- ETS requires ***grave danger to all workplaces***
- President not have authority to mandate vaccinations
- This is a public health initiative masked as an OSHA Rule
- Arbitrary and capricious to tie mandate to number of employees rather than nature of the work and work environment



NECA Legislative Update on Issue

- The EO has been issued, but we expect and will push for rulemaking and questions and answers from the government
- The ETS is expected in the next few weeks, and we are working hard to lobbying for a fair and clear standard that references and accounts for the economic toll this will have on employers
- NECA legal and Government Affairs will continue to update the chapters and members as these issues develop.



QUESTIONS?

