



# Employee COVID Vaxx / Testing Mandates, Options, Tips and Traps

**November 2, 2021**

**Presented by**

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- U.S. News Best Lawyers “Best Law Firms,” 2021 and “Client Service A-Team,” 2020 – BTI Consulting Group

**Let's Start With the Latest as of 12:01pm. . . .**



# What We All Need Besides an Injunction. . . .



## Agenda

1. Quick overview recap
2. Basic 100 or more employee requirements
3. Basic covered federal contractor and subcontractor requirements
4. Key tips and traps

## Where Did This Come From?

- Biden Administration  
COVID-19 Action Plan  
– “Path Out of the  
Pandemic”
- Sept. 9, 2021 plan
- <https://www.whitehouse.gov/covidplan/>



## Key Employee Initiatives - Federal

### “Vaccinating the unvaccinated”

1. Employers with 100 or more employees
  - *Vaxx or test + PTO to vaxx (and “recover”)*
2. Certain federal contractors and subcontractors
  - *Vaxx*
3. Health care workers at certain facilities that receive Medicare or Medicaid reimbursement
  - *Vaxx*
  - *Not addressing today given the broad audience*



*All from 1 federal plan, but under 3 different regulatory buckets (with different legal issues)*

## Key Employee Initiatives - Other

### But There Are Other Vaxx Mandates Too. . . .

- E.g., *Federal* site access vaxx requirements per Jan. 2021 [EO 13991](#) and Safer Federal Workforce Task Force Agency [Model Agency Safety Principles](#) issued July 2021 + updated Sept. 13, 2021
- E.g., *State* requirements such as CO Dept. of Health & Environment's Emergency Rule, 6 CCR 1101-1, Chapter 2 Part 12 (Healthcare)
- E.g., *Local* requirements such as Seattle EO 2021-08: COVID-19 Vaccination Requirements for City Contractors



# 100 or More Employee Requirement

## ■ Basic obligation -

- “[R]equire all employers with 100 or more employees 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.”
- “[R]equire employers with more than 100 employees to provide **paid time off** for the **time it takes for workers to get vaccinated** or to **recover** if they are under the weather post-vaccination.”

## ■ Regulatory source -

- Federal DOL, OSHA Emergency Temporary Standard (ETS) - yet to be issued; *review completed by White House Office of Information and Regulatory Affairs (OIRA) yesterday (Nov. 1); to be published in the Federal Register “in the coming days”*

# 100 or More Employee Requirement

## ■ Vaxx or test -

- Covered employees must be “fully vaccinated”; *or*
- “Produce a negative test result on at least a weekly basis before coming to work”

## ■ Type of test -

- Unspecified, at present – but. . . .
- Per Safer Federal Workforce FAQs re: federal workers – any FDA-authorized viral test is allowed (e.g., antigen, PCR, rapid)

## ■ Method and type of documentation -

- Unspecified, at present

## 100 or More Employee Requirement

- Employer provided paid time off (PTO) -
  - For time to get vaccinated
  - For time to “recover” from vaccination
- Max and min. PTO leave parameters -
  - Unspecified, at present
- Use of current employer PTO -
  - Can employers require employees to use existing accrued PTO for this purpose?
  - Similar to FFCRA rules?

# 100 or More Employee Requirement

## ■ Employers covered -

- *Appears* to cover private and state / local public employers
- *Appears* to cover for-profit and not-for-profit entities
- *Appears* to cover religious and non-religious entities (constitutional issues aside, for the moment)

## ■ 100 employee count determination timing -

- As of the effective date? 12-mo. rolling payroll period? Other?
- Can employers go in and out of coverage?

# 100 or More Employee Requirement

- Employee count method -
  - Unspecified, at present
  - “Company”-wide vs. by legal entity or location?
  - To include “affiliated” entities?
  - DOL to use. . . .
    - OSHA-like definition?
    - FFCRA-like definition?
    - Title VII-like definition?
    - “Joint employer” test, similar to FFCRA?

## 100 or More Employee Requirement

- **Employees covered / excluded -**
  - Undefined, at present
  - Likely to include certain independent contractors working at covered facilities?
  - Will remote employees not working in contact with others be excluded for purposes of the vaxx or test mandate (provided they are fully remote and don't come to the brick & mortar physical work location – or come “infrequently”)?

## 100 or More Employee Requirement

### ■ Employee exceptions -

- Unspecified, at present
- Yet ADA disability and Title VII religious accommodation requirements remain + will apply
- *Note – The implicit, embedded pseudo-accommodation for non-vaccination = test*
- Yet what about potential requested accommodations for testing itself (which we have seen)?

# 100 or More Employee Requirement

## ■ Timing -

- New DOL, OSHA Emergency Temporary Standard (ETS) to be published **this week**
  - Must show “grave danger” to worker safety + support
- Potential phase-in compliance deadline window (if any) is not yet announced
- Will require state-level ETS or “just-as-effective measure” adoption in the 22 current OSHA-state-plan states such as CA, MI, NC, SC and VA (<https://www.osha.gov/stateplans>)
- *This means the timing and exact terms of the ETS as applied across the 50+ states / territories may vary*



# Fd. Contractor / Subcontractor Requirement

## ■ Basic obligation -

- Requires certain contractors that do business with the federal government + related subcontractors to ensure their workforce is fully vaccinated – *regardless of size*

## ■ Regulatory source -

- Sept. 9 Executive Order (EO) regarding “Adequate Safety Protocols”: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>
- Safer Federal Workforce Task Force Guidance, FAR Council Instructions + individual agency Directives (e.g., GSA, DoD)

## Fd. Contractor / Subcontractor Requirement

### ■ Vaxx only -

- Covered employees must be “fully vaccinated,” per Safer Federal Workforce Task Force guidance
- *No alternate testing option outside of religious / disability accommodations*
- A recent antibody test cannot be used to prove vaccination status
- Prior COVID-19 infection cannot be used as an alternate to being fully vaccinated (albeit CDC-recommended delay may apply)
- **Overrides** 100-employee vaxx or test rule *for certain employees*

### ■ Type of test -

- N/A

### ■ Employer provided paid time off (PTO) -

- N/A, *unless* the 100-employee OSHA ETS applies to you

## Fd. Contractor / Subcontractor Requirement

### ■ Method and type of documentation -

- *Type:* (1) CDC or other COVID-19 vaccination record card or printout; (2) record of immunization from a health care provider or pharmacy; (3) medical records documenting the vaccination; (4) immunization records from a public health or state immunization information system; or (5) any other official documentation containing required data points
- *Data points:* type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s)
- *Format:* Hard copy or digital is acceptable – e.g., a digital photograph, scanned image or PDF that “clearly and legibly displays the information outlined”

## Fd. Contractor / Subcontractor Requirement

- Employers covered (*per express EO terms*) -
  - Prime federal contractors and subs with:
    - a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property;
    - a contract or contract-like instrument for services covered by the Service Contract Act, 41 U.S.C. 6701 et seq.;
    - a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b); or
    - a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents or the general public

## Fd. Contractor / Subcontractor Requirement

- Employers covered, put another way -
  - *In theory*, not all federal contractors and subcontractors
  - *In theory*, only apply to employers with certain contracts for *services + construction, concessions and leased real estate* – including services provided at or in connection with federal property or land
  - *In theory*, *supply* contracts providing “goods” to the federal government (and similar subcontracts to federal prime contractors) are not covered
  - *In theory*, Task Force Guidance references to the federal contractor minimum wage EO / proposed regulations provide an argument that *non-Service Contract Act (SCA) services* are not covered

## Fd. Contractor / Subcontractor Requirement

- Contracts not covered (*per express EO terms*) -
  - Grants
  - Indian Tribe contracts
  - Contracts with a value equal to or less than the FAR simplified acquisition threshold (SAT) - currently \$250,000
  - Contracts involving employees performing work outside the U.S.
  - Subcontracts solely for the provision of products

## Fd. Contractor / Subcontractor Requirement

### ■ Employees covered -

- NOT all contractor employees at all US sites
- FT or PT employees of a covered contractor:
  - Working “on or in connection with a covered contract,” OR
  - Working at a covered contractor workplace
- A covered contractor workplace = “a 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**”

## Fd. Contractor / Subcontractor Requirement

- Thus, per the Task Force, covered employees also include -
  - Employees who perform tangential duties “necessary” to the performance of the covered contract, but who are not directly engaged in the contract work (e.g., HR, billing, and legal review)\*\*
  - Employees in buildings and sites within a campus – and floors and areas of a given building or location – who may “come into contact with a covered contractor employee” during the period of performance (e.g., elevators, cafes)
  - Remote employees working on or in connection with a covered contract or subcontract



## Fd. Contractor / Subcontractor Requirement

### ■ Employee exceptions -

- ADA disability, Section 503 disability, and Title VII religious accommodations
- Task Force FAQs list info. and examples re: “limited exceptions to vaccination requirement”
- Task Force FAQs provide sample religious and disability accommodation forms (albeit very narrow in scope and designed for use by federal agencies)
- <https://www.saferfederalworkforce.gov/faq/vaccinations/>

## Fd. Contractor / Subcontractor Requirement

### ■ Regulatory timing -

- Effective date is not automatic
- Graduated rollout schedule beginning after Oct. 15, 2021
- Will apply to all new contracts and optioned, amended and extended contracts; agencies may add the FAR clause to existing contracts as well
- FAR clause flow-down obligations apply from prime to first-tier subcontractors + from subcontractor to subcontractor “at all tiers”
- Earliest “fully vaxxed” deadline: **December 8, 2021\*\***

## Tip

- Who pays for testing costs will be a hot topic
  - Con –
    - FLSA exempt employee “deduction” limits
    - ADA / Title VII accommodation limits
    - State “expense” law limits (e.g., CA)
  - Pro –
    - Oct. 28 WH press leak that the OSHA ETS “will give employers the option of paying for testing and masks for unvaccinated workers or compelling those employees to foot the bill themselves”

## Trap

- How you pay for vaccination and testing time will be a hot litigation target
  - Application of required PTO and related rules
  - Non-exempt “hours worked” and overtime calculations for vaxx time, testing, document submission, etc.
  - Subject to easier class claims (vs. religious and disability accommodation suits)

## Tip

- Look out for the FAR Clause
  - FAR 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors
- And push-back on over-aggressive application
  - FAR 52.223-99 does not flow down to subcontracts “solely for the provision of products”
  - Strike – or add “*,if and as applicable*”

## Trap

- EO 14042 scope is not what it seems!!!
  - A variety of federal contracts and subcontracts are exempted under the *express* terms of the EO
  - However, the FAR Council and agencies have taken a very aggressive position in rolling out the mandate – “encouraging” contracting officers to include the EO clause in all federal contracts
  - See: [EO Scope Alert](#)
  - Note: agency pressure flows downhill. . . .

## Tip

- Review and update your disability and religious accommodation processes and forms – tailored for vaccinations
  - Also begin developing draft policies that comply with the federal plans, with embedded accommodation references
  - Consider added staffing and other support you may need to address (a) implementation, and (b) potential labor shortages

## Trap

- How you document and scrutinize accommodations have pros and cons
  - E.g., “sincerity” of “religious” beliefs
  - E.g., “undue hardship” under Title VII vs. CA law vs. ADA disability standard
- Weigh false accommodation request deterrence vs. claim risk vs. employee retention risk
- *Weigh testing cost pass-through decisions as well*





## Tip

- Legal challenges are in process that may block or delay implementation
  - 4 federal actions filed Thurs. and Fri. vs. the EO
  - FL, MO, GA and TX; 19 separate state AGs
  - Nationwide preliminary injunction possible
  - Note: OSH Act requires that a challenge to any ETS be brought directly in the Courts of Appeals by petition for review

## Trap

- Federal preemption may be tricky
  - Texas, Montana, etc. state anti-vaxx EOs and laws are arguably preempted by EO 14042 and the OSHA ETS
  - *But*, for example, TX EO GA-40 vaxx exemption for “any reason of personal conscience” will cause issues
  - *But*, if you are overaggressive in applying EO 14042 beyond strictly “covered employees,” you remain open to employee legal challenge in TX, MT, etc.

# Questions / Comments / Triage Help

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## McGuireWoods COVID-19 Resources

- <https://www.mcguirewoods.com/coronavirus-impact>
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