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Many of you requested frequent updates re the Covid Vaccine EO and associated Task Force guidance. Accordingly, now and then we'll be circulating group BCC updates like this. *If these become too frequent or otherwise annoying, just let us know and we'll take you off the list.*

Ryan, Nikki, and I have been doing a lot reading (and thinking) over the last six days. We've also spent some time brainstorming with our various government friends. As you can imagine, we've also been deluged with questions from clients. Since we expect most of you have similar questions, here is our updated thinking on a number of key issues.

- 1. Contract-Like Instruments.** The EO and Task Force Guidance clearly are meant to cover most any contract or contract-like instrument over the SAT. Certainly, procurement contracts, Task Orders, and BPAs are covered. As are non-contract instruments like CRADAs, Cooperative Agreements, lease agreements, permits, and OTAs. Frankly, it's hard to think of an agreement with the Government that would not be governed by the rule (except for Grants, which specifically are exempted at this point). If you have an agreement with enforceable obligations to the federal Government, it is quite likely it is within the rule's reach.
- 2. Services or SCA Services?** While the plain text of the EO led us to believe we had a good argument the new rule would apply only to SCA-governed services and not all services, we no longer believe that to be the case. The more we analyze the materials, and notwithstanding the odd nature of the EO language, ***the more confident we are the rule will apply to all services involving a human being – SCA-covered or not.***
- 3. Human Being Services or Other Services?** While we believe the rule will apply to all services involving a human being, it remains to be seen whether/how the rule will apply to other services (e.g., data hosting, SaaS, bandwidth, etc.). In other words, if you have a contract to provide the Government data hosting and you sell it as a licensed service, it is unclear whether this "service" will be captured by the rule. Our best guess at this point: it will be covered. But that's just a guess. We have urged GSA to clarify this issue in the forthcoming contract clause deviation.
- 4. Which Employees Are Covered?** In short, MOST. The rule covers three groups of employees: (a) those working on a covered contract, (b) those supporting a covered contract, and (c) those working in a facility where either (a) or (b) is "likely" to be present. And remember, the rule applies a VERY broad interpretation of "working in connection with," which includes HR, accounting, and legal personnel. Thus, we suspect the Government will take the view that the totality of a company's "shared services" personnel will come within the ambit of the rule. The one open question here is whether top company leadership (e.g., CEO) will be covered. Our guess is yes, he/she will, but it may matter whether leadership is employed by the contracting entity or a parent company. Here again, we have urged GSA to clarify this issue in its forthcoming contract clause deviation.



5. **Which Facilities?** We continue to believe the rule will be applied *very* broadly to contractor facilities. If a covered employee works in or is “likely” to visit a given facility, we believe the rule will reach into that facility. Thus, even if you have a purely commercial facility, but a shared-service professional (e.g., in-house counsel) is likely to visit that facility, then the whole facility will be covered. And we probably should avoid any illusion that we can stand up a separate, non-covered facility to avoid the rule. This will be extremely hard for most companies since the “in connection with” prong of the rule is quite broad.
6. **Exemptions.** Frustratingly, the Guidance fails to provide parameters to assist contractors in evaluating requests for medical and religious exemptions. We have urged GSA not only to give guidance, but to work toward providing immunity to companies that make good faith exemptions decisions. We are not optimistic our advice will be adopted any time soon.
7. **Timing.** Agencies will begin including the new clause (via agency deviations) in contracts by October 15, 2021. But the guidance *strongly encourages* agencies to incorporate the clause into existing contracts as soon as possible – “prior to the date upon which the order requires inclusion of the clause.” Once you have the clause in your contract, your covered employees must be vaccinated by December 8, 2021. After that, covered employees must be fully vaccinated by the first day of performance on a new or extended contract.
8. **Coordination.** The Task Force Guidance requires contractors to designate one or more person to coordinate the contractor’s compliance efforts. Importantly, this person’s role goes well beyond drafting a policy and ensuring those little social distancing stickers are strategically placed. This person actually must make meaningful efforts to ensure compliance by individuals – including vaccine documentation, social distancing, and *proper* mask wearing.
9. **Visual Review of Proof of Vaccination.** The Task Force Guidance requires that covered contractors *actually review* proof of vaccination for each covered employee. Self-attestations will not suffice. With many employees still working remotely, covered contractors will need to develop an electronic submission and review system that enables this review but also complies with the applicable standards for storing and protecting employee healthcare information.
10. **Enforcement.** It is an open question when and how the Government will enforce these new rules. The President’s stated goal to vaccinate as many human beings in the U.S. as quickly as possible makes us think we will see more active enforcement earlier in the regulatory life cycle than we do with most initiatives. Also, whereas plaintiff’s lawyers often wait some time before filing suits (to avoid defenses that contractors have not had adequate time to comply yet), we’re not so sure they will be as patient here in light of the clarity of the rule (in many respects) and the clear deadlines (again, in many respects).

Keep in mind, we should be seeing agency deviations coming out within the next 10 days. We will learn a lot more then. We will keep you apprised.

-Jonathan, Ryan, Nikki