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Five Key Takeaways For Colleges and Universities From the New Federal Vaccination Mandate

By: Jonathan Aronie and Ryan Roberts*

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Colleges and universities with U.S. government-sponsored research or other non-grant funding take note. On September 9, 2021, President Biden signed an Executive Order (EO) to implement COVID safety protocols for Federal service contractors and subcontractors. Among other things, the EO (along with the Safer Federal Workforce Task Force Guidance that provides the substantive requirements and the standard contract clauses incorporating the Guidance into Federal contracts) requires that entities holding Federal contracts (or "contract-like instruments"), including colleges and universities, mandate vaccinations and other safety protocols for a wide swath of their employees. Unlike the forthcoming related OSHA rule, the EO does not permit employees to provide regular negative test results in lieu of proof of vaccination.

This summary alert highlights a few of the issues that will be of particular importance to institutions of higher education. More detailed information can be found in the Sheppard Mullin EO 14042 Survival Guide.

1. Scope of the Executive Order and Implementing Guidance

While the new mandatory clauses do not apply to grants, they do apply to "contracts and contract-like instruments," which most higher education institutions hold in abundance. In fact, according to the Congressional Research Services, the Federal Government is the largest source of academic R&D funding in the U.S., with most funding coming from DOD, HHS, NSF, NASA, and DOE. The National Science Board found that the Federal Government historically has provided about 50% of all academic R&D funding in the U.S.

To give a sense of the scope of Federal contracting with higher education institutions, consider these data shared by the Federal Government showing that U.S. Government agencies awarded contracts to colleges and universities totaling over $10 billion in FY2018 (the most recent data available):

In short, if your institution conducts sponsored research, you very well may hold a Federal contract or "contract-like instrument." The American Council on Education seems to agree, as evidenced by its September 2021 EO 14042 Alert to its members.

If a college or university holds a covered contract (or subcontract), the new rules reach to all of its "covered employees." A covered employee is someone who

1. Works on a covered contract,
2. Works in connection with a covered contract, or
3. Works in a workplace in which someone in one of the first two groups is likely to visit.

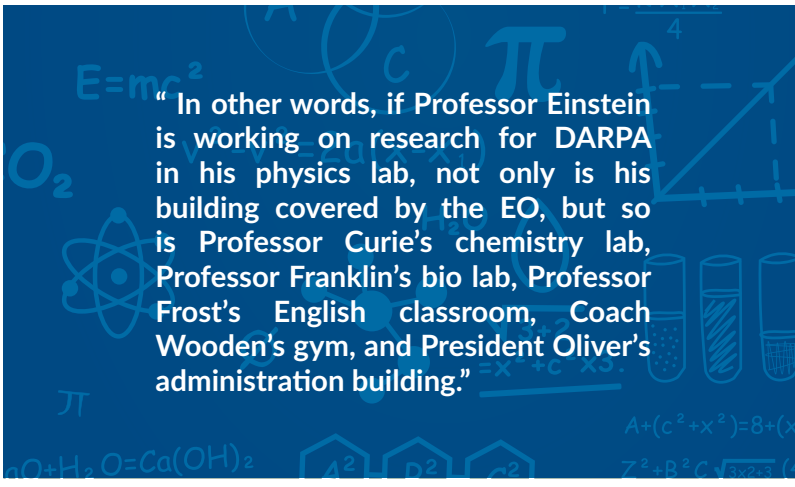
Importantly, the "in connection with" language is meant to cover employees beyond direct billers. While the implementing Guidance does not define the term, a recent DOL regulation using the same language is instructive. DOL considers a worker performing "in connection with" a covered contract to be "any worker who is performing work activities that are necessary to the performance of a covered contract but who is not directly engaged in performing the specific services called for by the contract itself." For example, according to DOL, a payroll clerk who processes the paychecks of a direct bill employee – though not performing directly on the contract – is performing "in connection with" the contract.

The breadth of this definition will be a big deal for larger institutions. But the broad reach of the "covered workplace" bucket is where the EO and Guidance get their real power. It is worth quoting the Government's FAQ on this subject here in full:

> Q: If a covered contractor employee performs their duties in or at only one building, site, or facility on a campus controlled by a covered contractor with multiple buildings, sites, or facilities, are the other buildings, sites, or facility controlled by a covered contractor considered a covered contractor workplace?
>
> A: Yes, unless a covered contractor can affirmatively determine that none of its employees in or at one building, site, or facility will come into contact with a covered contractor employee during the period of performance of a covered contract. This would include affirmatively determining that there will be no interactions between covered contractor employees and non-covered contractor employees in those locations during the period of performance on a covered contract, including interactions through use of common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.

In other words, if Professor Einstein is working on research for DARPA in his physics lab, not only is his building covered by the EO, but so is Professor Curie's chemistry lab, Professor Franklin's bio lab, Professor Frost's English classroom, Coach Wooden's gym, and President Oliver's administration building.

In short, if one building of a campus is covered, all buildings of the campus are covered UNLESS the university "can affirmatively determine that none of its employees in or at one building, site, or facility will come into contact with a covered contractor employee during the period of performance of a covered contract." Considering this prohibition covers



"lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages," parsing a campus into "covered" and "not covered" workplaces will be no easy task for most institutions.

It's also important to note that the EO covers full and part-time employees, which, presumably, would cover faculty, administration, staff, and even student workers on a university campus.

Another way a university may find itself on the receiving end of the contract clauses are through its participation in the military's ROTC program. ROTC was established by statute and is implemented through contracts between the various military branches and civilian universities. We have seen no language in the EO or the Guidance that would suggest university/military ROTC contracts will not be covered by the new rules.

In contrast, it is unlikely a university becomes a covered contractor merely by participating in the Government's Pell Grant program. In 2019, the DOL issued an advisory that a school's "status as a conduit for Pell Grants" does not itself render it a Federal contractor for purposes of the EO 11246 flow down requirements. We suspect the same rule will hold true for EO 14042.

"All 'Covered Contractor Employees' must be fully vaccinated by December 8, 2021 (unless entitled to a legal accommodation), including covered contractor employees working from home."

2. Obligations

Following the issuance of the EO, on September 24, 2021, the Government's Safer Federal Workforce Task Force issued Guidance setting out specific workplace safety protocols and providing a few Questions and Answers to aid in interpretation of those protocols. Subsequently, the Government issued new clauses contracting officers have begun inserting into Federal agreements.

Broadly speaking, the Task Force Guidance requires vaccinations (with certain limited exceptions), proper masking, and physical distancing. The specifics are spelled out in the Task Force Guidance.

All "Covered Contractor Employees" must be fully vaccinated by **December 8, 2021** (unless entitled to a legal accommodation), including covered contractor employees working from home. If you do the math, this means Federal contractors that will be covered by the rule better get started NOW because employees are only considered "fully vaccinated" once they are two-weeks past the second dose of a two-shot vaccine, or two weeks after receiving a one-shot vaccine. What this means is that

- **October 27, 2021** was the last day a Covered Contractor Employee could receive the first shot of a Moderna two-shot vaccine in order to be in compliance with the Guidance considering the four-week waiting period between shots,
- **November 3, 2021** is the last day to receive the first shot of a Pfizer-BioNTech two-shot vaccine considering the three-week waiting period between shots, and
- **November 17, 2021** is the last day to receive the Johnson & Johnson single shot vaccine.

After December 8, all Covered Contractor Employees must be fully vaccinated by the first day the contract clause is incorporated into your contract(s) (e.g., the period of performance for a new contract, the first day of the period of performance on an exercised option or extended/renewed contract when the clause has been incorporated into the covered contract, or the first day the Government issues a modification to your contract incorporating the clause).

The Guidance also requires Covered Contractors to follow the CDC's guidelines for masking and physical distancing at a Covered Contractor Workplace, which applies to employees and visitors. The applicable guidelines depend on whether the Covered Contractor Workplace is located in an area of high or substantial community transmission. These guidelines also vary (i.e., are less stringent) depending on whether an individual is fully vaccinated.

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3. What happens if I don't comply?

The new rule does not outline penalties for non-compliance, and it is unclear how vigilantly or quickly the Government will begin enforcement. Accordingly, it is likely the penalty structure will follow the penalty structure for any other contractual non-compliance – a warning, a threatened termination, and then an actual termination with damages. The Government has expressed an expectation that its contracting officers will try to work with non-compliant contractors who are making a good-faith effort to come into compliance. We expect prime contractors to act similarly – especially where the subcontractor is providing a critical service. Thus, we do not expect to see terminations in the first instance.

If warnings do not succeed in curing the non-compliance, we would expect to see more aggressive enforcement action follow, including the following:

- ***Termination*** – The Government/Prime could terminate for breach of contract for failure to comply with a material contract clause, and request reprocurement costs.
- ***False Claims Act Liability*** – If the non-compliance is found to be "knowing" (i.e., reckless or deliberately indifferent) the Government could pursue significant damages and penalties under the civil False Claims Act.
- ***Suspension/Debarment*** – A college or university that irresponsibly ignores or actively seeks to circumvent its obligations under the new FAR clause could find itself in receipt of a "notice of concern" or "show cause letter" from the cognizant Federal Suspension/Debarment Official.

It is worth pointing out here that the Government has used the False Claims Act to pursue colleges and universities for non-compliance with the terms of their contracts in many areas, including student aid funding, medical testing, scientific research, administration of grants, construction contracts, and improper recruiter payments. You can read more about the potential FCA implications of COVID-related contracting HERE.

4. What To Do Now?

Colleges and universities already have begun receiving the FAR clause from their Federal contracting officers. As the December 8 deadline is right around the corner, there are some critical steps the higher education community should take now to ensure compliance. Here are a few ideas:

- Check out the EO, the Guidance, the standard FAR contract clause, and Sheppard Mullin's EO 14042 Survival Guide to ensure you understand your obligations under the new rule.
- Appoint an EO 14042 coordinator.
- Gather and review your Federal contracts and "contract-like instruments."
- Begin identifying those employees who work "in connection with" your Federal contracts (and subcontracts) since they will be covered by any new internal controls you implement.
- If you have not done so already, develop a plan for how you will implement the new vaccination rule.
- Train your Human Resources department regarding the process for requested religious and disability/medical exemptions. There will be a lot of these coming your way. Discuss what accommodations can be made.

5. Stay Informed

While colleges and universities may not consider themselves Federal contractors, many of them are. As such, the new EO and contract clauses apply to them with as much force and certainty as it does to the country's largest aerospace and defense contractors. The EO 14042 landscape, however, is ever-changing, and any entity holding a Federal contract (or a "contract-like instrument") would be well-advised to connect with their L&E and GovCon counsel ASAP to ensure they are ready for the December 8 deadline.

Questions? Contact:

Jonathan Aronie
Partner, Washington, D.C.
202.747.1902
jaronie@sheppardmullin.com

Ryan Roberts
Partner, Washington, D.C.
202.747.2187
reroberts@sheppardmullin.com

Jonathan Aronie and *Ryan Roberts* are partners in the Washington, DC office of Sheppard Mullin. Jonathan leads the firm's Government Contracts and Investigations Group and co-founded the firm's Organization Integrity Group. Ryan is a partner in the firm's Government Contracts and Investigations Group, and co-leader of the Group's EO 14042 Task Force. For more information about Sheppard Mullin, the Government Contracts Group, or the Organizational Integrity Group, click on the appropriate link.