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New Guidance Suggests the Government May Begin Enforcement of the Federal Contractor Vaccine Mandate

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On Friday, October 14th, the Safer Federal Workforce Task Force (“Task Force”) published new guidance for upcoming potential enforcement of the federal contractor vaccine mandate established by Executive Order 14042, “Ensuring Adequate Safety Protocols for Federal Contractors.”

Task Force's New Guidance

The Task Force issued the guidance in anticipation of a “potential narrowing of the existing national injunction on October 18, 2022, due to developments in ongoing litigation.” The Eleventh Circuit's mandate concluding that the Government did not have the authority to impose the vaccine mandate under the Federal Property and Administrative Services Act, but limiting the nationwide injunction, takes effect on October 18th.

The guidance signals the Government's intent to begin inserting clauses implementing Executive Order 14042 in new solicitations and contracts. The Task Force will begin a series of steps to determine whether, and to what extent, federal agencies may enforce the vaccine mandate. These steps include:

1. Notifying federal agencies on the requirements to comply with injunctions applicable to Executive Order 14042.
2. Issuing updated guidance regarding the enforcement of Executive Order 14042, including a new timeline for contractors and subcontractors to comply.
3. Publishing revised guidance to federal agencies on the timing and considerations for written notice to contractors regarding enforcement of Executive Order 14042.

Critically, the guidance expressly prohibits federal agencies from taking any action to enforce the vaccine mandate until the above-referenced steps are completed.

Status of Injunctions

The guidance acknowledges that Executive Order 14042 has been the subject of extensive litigation in numerous jurisdictions challenging the enforceability of the vaccine mandate. While there is no longer a nationwide injunction, six courts have issued separate preliminary

injunctions prohibiting enforcement of the vaccine mandate that remain in effect:

1. **E.D. of Kentucky:** enforcement of vaccine mandate is enjoined for covered contracts performed in Kentucky, Ohio, and Tennessee.
2. **S.D. of Georgia:** enforcement of vaccine mandate is enjoined (a) for covered contracts with the plaintiff states and their agencies, Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, and West Virginia, and (b) with any member of the Associated Builders and Contractors trade association.
3. **W.D. of Louisiana:** enforcement of vaccine mandate is enjoined for covered contracts with the plaintiff states and their agencies, Louisiana, Mississippi, and Indiana.
4. **E.D. of Missouri:** enforcement of the vaccine mandate is enjoined for covered contracts performed in Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, and Wyoming.
5. **M.D. of Florida:** enforcement of the vaccine mandate is enjoined for covered contracts performed in Florida.
6. **Dist. of Arizona:** enforcement of the vaccine mandate is enjoined for covered contracts performed in Arizona.

Many of the above-referenced cases are in various stages of appeal. As recent as October 3rd, the Fifth Circuit heard oral argument on the Government's appeal of the preliminary injunction issued in Louisiana. On July 21st, the Sixth Circuit heard oral argument relating to the Kentucky case. Over the course of the coming weeks and months, we expect to receive additional decisions construing the enforceability of the vaccine mandate.

Compliance with the Vaccine Mandate

Notwithstanding the complexities of the preliminary injunctions, contractors should take steps to prepare for the prospect that the Government may begin enforcing Executive Order 14042 in covered contracts and subcontracts. This includes reviewing prior Task Force guidance regarding the scope of the vaccine mandate, including how to identify covered contracts and covered workplace locations.

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