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MCAA Webinar on Executive Order 14042

Questions & Answers

November 10, 2021

The information contained in these Questions & Answers should not be construed as legal advice and readers should not act upon it without consulting professional counsel.

1. Is a city or county public entity considered a federal agency since they receive federal funds?

A city or county public entity is not a federal agency or a federal contractor for purposes of Executive Order 14042 just because it receives federal funds. If the public entity has a contract or contract-like instrument with the Federal Government under which the public entity provides services, then the public entity may be a covered contractor.

2. Regarding contract modifications, what if you object and do not agree to sign? What are the consequences if any? Is the contractor in breach of the contract?

This would depend upon whether the contract under which the modification is being issued is a covered contract. If the contract is a covered contract, then the federal agency potentially may issue a unilateral contract modification to include the vaccine clause if the contractor refuses to sign a bilateral modification.

Contractors who do not comply with a clause in their contract could face various consequences, including potential termination of their contract for default.

3. Previous webinars stated a photo copy of the vaccine card would not be allowed. Does the employer need to witness that actual card?

The Safer Federal Work Force Task Force Guidance states that covered contractors may allow covered contractor employees to show or provide to their employer a digital copy of their vaccine record, including a digital photograph, scanned image, or PDF of the record. See,

https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf.

4. Regarding contract modifications, if you do agree to sign, can you add a cost to the mod?

Contractors who believe they may have a cost and/or schedule impact from complying with Executive Order 14042 should reserve their right to an equitable adjustment in the modification and then submit a request for equitable adjustment or claim with the contracting agency. If the contractor can calculate the exact



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impact, the contractor may want to try to negotiate the amount and schedule impact with the Contracting Officer prior to signing the modification.

5. Is there a specific form for medical or religious exemption?

No, there is no specific accommodation request form required by Executive Order 14042. However, in order to better facilitate the interactive process, it is advisable for a vaccination policy to contain language encouraging employees to submit their request for an accommodation in writing on a request for accommodation form which can be attached to the policy or provided upon request. Please also note that requests for an accommodation under the ADA or Title VII can be verbal or in writing and even if an employee only makes a verbal request, the employer will be required to engage in the interactive process with that employee. See, <https://www.eeoc.gov/employers/small-business/reasonable-accommodation-policy-tips>.

6. Can the mandate be extended or will it expire in 6 months?

Executive Order 14042 does not have a specified duration. The OSHA ETS is a temporary measure and a permanent standard is supposed to be finalized within six months after publication. It is unknown at this time how long Executive Order 14042 and/or any OSHA standard will remain in place.

7. Is this mandate indefinite?

See answer to Question No. 6.

8. Do the contractors get reimbursed by the government for employees who take time off to the vaccinated or who have to take time off due to adverse reactions?

Contractors subject to the Federal Contractor vaccine mandate can request that the Government reimburse them for employees who take time off to be vaccinated or recover from adverse reactions. However, it is unclear whether the Government will reimburse the contractor especially if the employee is entitled to paid time off under FAR 52.222-62, Paid Sick Leave Under Executive Order 13706.

With regard to employees subject to the OSHA ETS and not the Federal Contractor vaccine mandate, OSHA has taken the position that “[r]equiring employers to pay for vaccine administration is consistent with OSHA’s normal approach of requiring employers to bear the costs of compliance with safety and health standards.”

According to OSHA’s guidance, employers are required to support COVID-19 vaccination for each employee by providing reasonable time to each employee during work hours for each of their primary vaccination dose(s), including up to four hours of paid time, at the employee’s regular rate of pay, for the purposes of vaccination. The

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maximum of four hours of paid time that employers must provide for the administration of each primary vaccination dose cannot be offset by any other leave that the employee has accrued, such as sick leave or vacation leave. OSHA stated that the agency “is concerned that employees forced to use their sick leave or vacation leave for vaccination would have a disincentive to gaining the health protection of vaccination.” Employers must pay employees for up to four hours of time at the employee’s regular rate of pay. This may be achieved by paying for the time to be vaccinated as work hours for up to four hours.

As it relates paid time off for side effects, employers may institute a policy providing that employees must use their existing accrued paid time off for recovery from side effects. However, if the employee has exhausted their paid time off, the employee must offer a “reasonable” period of paid time off for recovery from side effects. OSHA has stated that up to two days of paid time off in such circumstances would likely be reasonable.

9. We have both federal contracts and non-federal contracts. Are you saying we must comply with both the ETS and Federal Contractor mandates?

Potentially, yes. Covered contractor employees are subject to the Federal Contractor vaccine mandate while employees who are not subject to the Federal Contractor vaccine mandate would be subject to the OSHA assuming the employer had a total of 100 or more employees on the effective date of the OSHA ETS (November 5, 2021).

10. What is the purpose of the government issuing the following form OMB Control No. 3206-0277, if not being vaccinated is not an option?

This form may be used by federal agencies to determine whether a visitor can access a federal facility. A visitor may or may not be a covered contractor employee. In addition, some covered contractor employees may be exempt from vaccination for a medical and/or sincerely held religious belief, practice, or observance.

11. If the employee has an adverse reaction, is the employer at risk to be held liable? If the employee has an adverse reaction, who do they hold liable?

This question demonstrates the precise reason that protective language in a mandatory vaccination policy and accompanying acknowledgment form is critical. The policy acknowledgment form that employees should be required to sign should state that the employee understands that it is their responsibility to obtain the vaccine, that they acknowledge that they will be advised of the risks associated with the vaccine by the vaccine administrator and that signing the acknowledgment form does not constitute consent to receive the vaccine. If the employee has an adverse reaction, they may have a claim against the vaccine administrator and/or vaccine manufacturer. Employees may also file for workers’ compensation and claim it was a job-related injury. To be deemed compensable, however, an employee would likely need to prove that an injury was

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related and/or connected to the course and scope of employment and meet compensability requirements within the relevant jurisdiction.

12. We have service vendors that come in from time to time to perform inspections or repairs as needed, they are not classified as Subs per the contract. Also, with delivery drivers? I assume since they are going to be on-site they will have to be vaccinated, however on whom does the burden of providing proof fall? I have not been able to find a clear answer on this.

Subcontractors under covered contracts with subcontracts in excess of the simplified acquisition threshold (generally \$250,000) are required to comply with the Federal Contractor vaccine mandate. Covered contractors are “strongly encouraged” to flow down the vaccine requirement in their non-covered contracts and agreements with non-covered contractors whose employees perform work at covered contractor workplaces but who do not work on or in connection with a Federal contract, such as those contracts and agreements related to the provision of food services, onsite security, or groundskeeping services at covered contractor workplaces. See,

https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf.

13. How does the current 5th court blocking the ETS impact the federal implementation dates?

The 5th Circuit’s stay is a temporary measure. As of November 11, 2021, the case is being briefed by the parties. It is anticipated that the court will hold a hearing after the briefing is completed and then issue a decision on whether to enjoin the OSHA ETS. Until the stay is lifted and a decision is made on whether to grant an injunction, the OSHA ETS will not move forward. As of November 11, 2021, the Federal Contractor vaccine mandate has not been stayed or enjoined and implementation is proceeding.

14. How will this be enforced and what are the penalties for non-compliance?

The Federal Contractor vaccine mandate generally will be enforced by the contracting agency. Covered contractors who are not taking steps to comply may be subject to “significant actions”, such as termination of the contract for default. In addition, there is the potential that the contractor could be suspended or debarred from doing business with the Government. Contractors who make false certifications or statements regarding compliance with the Federal Contractor vaccine mandate potentially could face False Claims Act and/or False Statements Act liability.

15. For federal contracts, are they required to offer exemptions for contractors? Or can they implement the mandate without offering the medical/religious exemptions?

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Federal contractors are required to provide accommodation to employees who request and qualify for a medical or religious accommodation under the ADA and/or Title VII assuming that providing the accommodation will not impose an undue burden on the employer.

16. If an employer can't ask religious questions on a job application, are we sure we can ask religious questions regarding a request for exemption? If so, can we now ask for religious affiliation on applications for employment?

The EEOC has released guidance related to evaluating an accommodation request for sincerely held religious beliefs under Title VII of the Civil Rights Act. Accordingly, yes, the EEOC states that an employer is permitted to make a limited factual inquiry as to the religious basis of the request or the employee's sincerity where the employer has an objective basis to doubt it. While what qualifies as a religion under Title VII can be broad, Title VII does not protect "social, political, or economic views, or personal preferences." The guidance also lists several factors, either alone or in combination, that might undermine an employee's credibility, including: (1) whether the employee has acted in a manner inconsistent with the stated belief; (2) whether the accommodation sought is a particularly desirable benefit; and (3) whether the timing of the request renders it suspect. On the first factor, the guidance cautions employers that religious beliefs may change over time; and therefore, an employee's inconsistently observed practices may nevertheless be sincerely held. See, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L>.

However, the answer above does not mean that employers are permitted to discriminate on the basis of an applicant's protected classification prior to making a job offer. An applicant's religion is a protected classification and employers are not permitted to discriminate on this basis, just like it would be unlawful to discriminate against an applicant on the basis of race, sex, or any other protected classification under federal, state or local law.

17. How would we possibly apply conflicting rules such as the "opt out" testing?

While there may be administrative burden on contractors, covered contractors must comply with the Federal Contractor vaccine mandate for those employees who are covered employees. For those workplaces not subject to the Federal Contractor vaccine mandate but rather the OSHA ETS, employers have the option of requiring all employees to be vaccinated (except exempt employees) or to permit test out.

18. If someone claims an exemption will they be allowed to work on a federal site?

This may depend upon the federal site. Generally speaking, employees who qualify for a medical or religious accommodation should be permitted access to a federal site but may

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be subject to restrictions such as providing negative COVID-19 test result, masking, and social distancing. Contractors should discuss this matter with their contracting officers.

19. We have employees who recently had COVID and cannot be vaccinated for 13-weeks. These employees may work at federal locations or in support of the project. Is there an accommodation for this situation?

Employees who cannot be vaccinated because they contracted COVID may qualify for a medical accommodation. Covered contractors that receive documented medical reasons that may not qualify as a disability but that necessitate a delay in vaccination can grant a covered contractor employee an extension of time to get vaccinated.

Generally speaking, employees who qualify for a medical accommodation should be permitted access to a federal site but may be subject to restrictions such as providing negative COVID-19 test result, masking, and social distancing. Contractors should discuss this matter with their contracting officers.

In this context, it would likely be a best practice to request written verification from the employee's medical provider to verify the reason that the employee is subject to a medical accommodation. The employee should also be advised that they have a continuing duty to update the employer when they would no longer be subject to the accommodation for medical reasons and to obtain the vaccine as soon as he or she is medically authorized to do so.

20. What happens if your company is under the 100 employee's on federal projects?

Covered contractors must comply with the Federal Contractor vaccine mandate regardless of the number of employees that they have.

21. I have been asked multiple times, if an employee has been vaccinated and there are severe side effects which cause financial hardship, who is financially responsible to compensate an employee and or employee family?

See answer to Question No. 11.

22. If an exemption is granted, what safety protocols would be considered as an accommodation? Would weekly testing be an accommodation for approved exemptions?

The EEOC's recent guidance reminds employers to consider possible alternative accommodations, such as engaging in masking and social distancing, weekly testing for COVID-19, remote working, reassignment, and often as a last resort, unpaid leave, in determining if an accommodation can be provided without an undue hardship. The EEOC emphasized that employers can rely on Centers for Disease Control and Prevention recommendations when assessing accommodations and whether they would pose an

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undue hardship. Where an employer would suffer an undue hardship (*i.e.*, more than de minimis cost or burden under the ADA or Title VII), it is not required to provide the accommodation. Employers may consider not only the direct monetary costs, but also the burden on the conduct of the employer's business, such as the risk of the spread of COVID-19 to other employees or to the public. Employers will need to analyze undue hardship on a case-by-case basis, and they will need to demonstrate the cost or disruption caused by the accommodations.

23. As a fellow attorney I understand the complex position of delivering the law, while not always able to understand the why....this executive order being a perfect example. But any idea why it applies to for instance admin (those working in support of) and not suppliers?

It is unclear. Executive Order 14042 does not explain why suppliers are not covered contractors. Federal agencies are encouraged to try to get the vaccine clause included in supply contracts.

24. When agencies present adding the EO clause to the contract as a change order, if contractor refuses to agree to change order can that agency issue a change directive arguing you have to comply and then it will work out equitable adjustment? Additionally, can contractor argue this is not a valid change order for reasons such as it represents a cardinal change or a change the contractor cannot meet?

If the contract is a covered contract, then the Government may be able to add the clause to the contract through a unilateral modification under the Changes clause. In that instance, the contractor can argue that it is entitled to an equitable adjustment. It is unknown, but probably unlikely, that the addition of the vaccine clause will be considered a cardinal change.

25. What types of accommodations are allowable when granting exemptions?

See answer to Question No. 22.

26. Say we work in a multi-employer high rise office building. If a company on a separate floor has a covered contract all companies in that building would be required to be vaccinated? If we are not the building owner how would that be enforced?

Generally speaking, employees of other companies who work in the same building as a covered contractor but who themselves are not covered contractors would not have to be vaccinated under the Federal Contractor vaccine mandate. The Federal Contractor vaccine mandate applies to covered contractor workplaces. A covered contractor workplace is a location controlled by the covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present.

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27. Can workers be on covered contracts without vaccination if we grant a religious accommodation?

Yes; however, the worker may be required to have weekly COVID testing, wear a face covering, and social distance depending upon the accommodation being provided by the employer and the burden on the employer.

28. OMB Form Control No. 3206-0277 which is a certification of vaccination has an expiration date of February 5th, 2022. Can you comment on this? How long can an executive order be in place?

When OMB forms are issued, they are given an expiration date, which usually is three years. I do not know why February 5, 2022 was chosen as the expiration date for this form. Agencies may continue to use “expired” OMB forms until an updated form is issued. It is unknown how long Executive Order 14042 will remain in place.

29. HIPPA being exempt from this - doesn't the employee have the right to deny disclosing their medical history?

Yes, an employee should not be required to disclose their medical history to the employer as it relates to requiring proof of vaccination. In fact, employers should be expressly instructed not to provide any genetic or family medical history when submitting their proof of vaccination in order not to run afoul of federal genetic privacy laws. However, if an employee is requesting an accommodation on the basis of a medical condition, then it means that he or she has affirmatively put their medical condition at issue and the employer is permitted to make a limited inquiry as to the medical condition's impact on the employee's ability to fulfill the terms and conditions of their employment and how an accommodation would assist the employee in fulfilling their job responsibilities. Employers may also request that an employee submit verification from a licensed medical provider to verify their need for an accommodation.

30. If we have workers on the site who are not vaccinated and need to do a weekly negative covid test do these test results need to be shown to the GC weekly or does the company just keep them in our records?

The answer to this question would depend on the GC's policy. The GC may require contractors to provide supporting documentation of testing performed on a weekly basis. Other GCs are merely requiring that their subcontractors provide a written attestation that their unvaccinated employees are being tested on a weekly basis and to provide supporting documenting if requested by the GC.

31. What guidance is there for an employer to determine validity of religious exemption? Are there any penalties for granting an exemption that they determine are unwarranted?

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For the first part of this question, see answer to Question No. 16. For the second part of this question, if this question is asking whether the EEOC would issue any penalties, no, there are no penalties for granting an accommodation. However, it is a best practice to document the reasons for granting an accommodation and if it contains the employee's medical information, it should be protected as confidential and kept in a file separate from the employee's personnel file. Employers should also keep in mind that if they are granting accommodations, such accommodations should be provided in a fair and consistent manner so that there is not disparate treatment among similarly situated employees which could lead to an EEOC investigation and/or discrimination/failure to accommodate claims.

32. Didn't answer my question. I didn't ask about vaccine status disclosure! I asked about my doctor disclosing a medical condition that my doctor feels exempts me from the vaccine.

See answer to Question No. 29.

33. Example. Does the janitor who cleans the building of a covered contractor have to be vaccinated?

It depends upon whether the janitor is an employee of a covered contractor and, if so, whether the janitor is a covered contractor employee. Under the Federal Contractor vaccine mandate, covered contractor employees include employees who are not working on or in connection with a covered contract but are working in the same facility as a covered contractor employee. Assuming the janitor is an employee of a covered contractor, unless the covered contractor can affirmatively determine that the janitor will not come into contact with a covered contractor employee during the duration of the covered contract, the janitor likely will be considered a covered employee subject to the vaccination requirement.