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Memorandum

To: Iowa Federation of Labor, AFL-CIO

**From: Jay M. Smith & Dennis McElwain
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Re: COVID-19 Executive Order 14042 for Federal Contractors

Date: November 15, 2021

On September 9, 2021, President Biden issued Executive Order 14042 (EO 14042). EO 14042 required that federal contractors establish a requirement that all employees receive a COVID-19 vaccination. EO 14042 then tasked the Safer Federal Workforce Task Force to develop guidance for federal contractors and subcontractors to come into compliance with the Executive Order.

The purpose of this Memorandum is to (1) help provide an explanation of the requirements of EO 14042; (2) its applicability; and (3) to provide tips regarding bargaining over the requirements of EO 14042.

Preliminarily, we note the following. Many International Unions may be providing information to their local affiliates regarding these matters. Additionally, many International Unions may be taking the lead in negotiations at an industry wide level. In turn, prior to relying upon information contained in this Memorandum, each Local Union should consult with its International Union first.

PART I – EO 14042 AND THE SAFER FEDERAL WORKFORCE TASK FORCE GUIDANCE

I. Effective Date

- By October 8, 2021, EO 14042 requires agencies to take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts and contract like instruments that are entered into on or after October 15, 2021 include the requirements of EO 14042.
- Covered contractor employees must be fully vaccinated no later than **January 18, 2022**.

- After January 18, 2022, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract.

II. Applicability

A. Existing Contracts

- EO 14042 does not apply to existing contracts with the Federal government until such time as the contract is renewed or extended.

B. New Contracts

- All new contracts with the Federal government must contain provisions ensuring compliance with EO 14042.

C. Definition of Contract

- The term contract as used in EU 14042 is meant to include the following:
 - All contracts and subcontracts of any tier thereunder;
 - All contracts whether negotiated or advertised, including any procurement actions;
 - Lease agreements;
 - Cooperative agreements;
 - Provider agreements;
 - Intergovernmental service agreements;
 - Service agreements;
 - Licenses;
 - Permits;
 - Any contract that may be covered under any Federal procurement statute; and
 - Any and all other types of agreements.
- The term “contract” is intended to interpreted “broadly.”

D. Covered Contractor

- The term “covered contractor” means a prime contractor or subcontractor at any tier who is a party to a covered contract.

E. Covered Contractor Employee

- The term “covered contractor employee” means any full-time or part-time employee of a covered contractor working on or in connection with a covered

contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.

F. Covered Contractor Workplace

- The term “covered contractor workplace” means 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.
- A covered contractor workplace does not include a covered contractor’s employee’s residence.
 - However, a covered contractor employee working exclusively from the employee’s home must be vaccinated.
- The Safer Federal Taskforce Task Force guidance applies both to outside and inside workplaces as well as all covered employer workplaces.
- An entire structure is subject to the EO, unless the covered contractor can affirmatively determine that there will be no interactions between the covered contractor’s employees and non-contractor employees, including interactions in common areas – e.g. elevators, stairwells, meeting rooms, etc.

G. Federal Workplace

- The term “federal workplace” means any place, site, installation, building, room, or facility in which any Federal executive department or agency conducts official business, or is within an executive department or agency’s jurisdiction, custody, or control.
- While at a Federal workplace, covered contractor employees must also comply with any additional workplace safety requirements for that workplace.

H. Subcontractors

- EO 14042 applies to subcontractors at all tiers.
- EO 14042 does not apply to subcontracts solely for the provision of goods.
- Under EO 14042, the prime contractor must flow the contractual clause that includes the executive order’s requirements down to the first-tier subcontractors.
- Higher-tier subcontractors must flow the executive order’s requirements down to the next, lower-tier subcontractor to the point at which subcontractor requirements are solely for the provision of products.

I. Size of Contractor

- Unlike the OSHA ETS, EO 14042 applies to all contractors regardless of size.

III. Vaccination Requirement

A. Deadline for Receiving Vaccination

- All employees of a covered contractor must be fully vaccinated no later than January 18, 2022 unless the employee is legally entitled to a vaccination.
- After January 18, 2022, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract or the first day of the extended or renewed contract.
- The effect of the January 18, 2022 deadline is that all covered employees must have received their second shot, if taking the Pfizer or Moderna vaccine, by January 4, 2022.

B. Vaccination Requirement

- People are considered to be fully vaccinated for COVID-19 two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single-dose vaccine.
- Acceptable vaccines include the J&J vaccine, Pfizer vaccine, Moderna vaccine, or any that have been authorized for emergency use by the WHO.
- Booster shots are not required at this point.
- Covered contractors are not required to provide vaccinations at their workplaces.
- Covered employees who have previously been diagnosed with COVID-19 must still obtain a vaccination.

C. Exceptions to Vaccination Requirement

- The covered contractor must consider requests for accommodations in the following two circumstances –
 - An employee indicates that the employee is not vaccinated for COVID-19 or cannot wear a mask, because of a disability (which would include medical conditions); or
 - An employee has a sincerely held religious belief, practice, or observance which does not allow the employee to receive the vaccine.
- The covered contractor is responsible for considering and dispositioning the requests for such accommodations. Each request should be considered on a case-by-case basis.
- If an agency is party to a covered contract as a “joint employer,” both the agency and the covered contractor should review and consider what, if any, accommodation they must offer.
- If a covered employee requests an accommodation, the covered employer does not need to resolve the request for accommodation prior to the time when the covered contractor’s employees begin work. However, while accommodation requests are pending, the covered contractor must require the covered contractor employee with the pending accommodation request to follow workplace safety

protocols for individuals who are not fully vaccinated as specified in the Task Force Guidance for Federal Contractors and Subcontractors.

- If an employee is given an accommodation, the covered contractor must contact the contracting officers when one of their employees works onsite at a Federal workplace. Such employees may have to abide by certain safety protocols including, but not limited to –
 - Masking;
 - Physical Distancing; and
 - Testing.
- If an accommodation request is rejected, the covered contractor must establish a timeframe for the employee to promptly become fully vaccinated.

D. Delays in Vaccinations

- Individuals may delay receiving a vaccination in the following circumstances –
 - Individuals who have COVID-19 until such time as the person has recovered from acute illness and have met the criteria to discontinue isolation;
 - People with a history of multisystem inflammatory syndrome (MIS-A) in adults until they have recovered from their illness and for 90 days after the date of diagnosis of MIS-A;
 - For 90 days after an individual has received monoclonal antibodies or convalescent plasma for COVID-19 treatment;
 - Those receiving immunosuppressive therapies until such time as doing so is consistent with the patient's medical condition and response to vaccine.
 - People who develop myocarditis or pericarditis after a dose of an mRNA COVID-19 vaccine;
 - People who have a history of myocarditis or pericarditis unrelated to mRNA COVID-19 vaccine until such time as those conditions have resolved; and
 - When otherwise recommended by healthcare provider.
- If there is a delay in the administration of the vaccine, covered employees must follow applicable safety requirements as if the employee had received an accommodation.
- Pregnancy, attempts to become pregnant, or situations where people are breastfeeding do not constitute adequate grounds for delay of a vaccination.
- COVID-19 vaccinations should not be delayed due the administration of other vaccinations – e.g. flu shots.

E. Verification Requirements

- Covered contractors are required to review covered employees' documentation to prove vaccination status.
- Covered employees are required to show or provide proof of vaccination. Such proof may be in the form of –

- A copy of the record of immunization from a health care provider or pharmacy;
- A copy of the COVID-19 Vaccination Record Card;
- A copy of medical records documenting the vaccination;
- A copy of immunization records from a public health or State immunization information system; or
- A copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of the health care professional or clinic site administering the vaccine.
- Attestation of vaccination by the covered contractor employee is not an acceptable substitute for documentation of proof of vaccination.
- Recent antibody tests from a covered contractor employee do not suffice as proof of vaccination status.

IV. Masking Requirements

A. General Rule

- Covered contractors must ensure that all individuals, including employees and visitors, comply with published CDC guidance for masking and physical distancing at a covered contractor workplace.
- Covered contractors also must comply with the CDC's guidance for mask wearing and physical distancing in the following settings:
 - Healthcare;
 - Transportation;
 - Correctional and detention facilities; and
 - Schools.

B. Areas of High or Substantial Community COVID-19 Transmission (Vaccinated Employees)

- In areas of high or substantial community COVID-19 transmission, vaccinated people must wear a mask in indoor settings, except in limited circumstances.
- Fully vaccinated people do not need to physically distance in areas of high or substantial community COVID-19 transmission.

C. Areas of Low or Moderate Community COVID-19 Transmission (Vaccinated Employees)

- In areas of low or moderate community COVID-19 transmission, fully vaccinated people do not need to wear a mask.
- Fully vaccinated people do not need to physically distance in areas of low or moderate community COVID-19 transmission.

D. Community Transmission Information

- To determine the level of community transmission, covered contractors must check the CDC COVID-19 Data Tracker County Website, available at: <https://covid.cdc.gov/covid-data-tracker/#county-view>.

E. Unvaccinated Employees

- Individuals who are not fully vaccinated must wear a mask indoors and in certain outdoor settings regardless of the level of community COVID-19 transmission in the area.

F. Requirements for Mask Wearing

- Covered contractors must require individuals in covered workplaces who are required to wear a mask to –
 - Wear appropriate masks consistently and correctly (over mouth and nose);
 - Wear appropriate masks in any common areas or shared workplaces; and
 - For individuals who are not fully vaccinated, wear a mask in crowded outdoor settings or during outdoor activities that involve sustained close contact with other people who are not fully vaccinated, consistent with CDC guidance.
- Exceptions to mask requirements include –
 - When an employee is alone in an office with floor to ceiling walls and a closed door;
 - For a limited time when eating or drinking and maintaining appropriate distancing;
 - Activities where a mask may get wet;
 - High intensity activities where covered contractor employees are unable to wear a mask due to difficulty breathing;
 - Activities for which wearing a mask would create a risk to workplace health, safety, or job duty as determined by a workplace risk assessment;
 - or
 - Briefly, for identification purposes.

V. Screening

- If contractor employees have symptoms consistent with COVID-19, such employees should not enter a federal workplace.
- Federal employees and contractors working onsite should regularly complete virtual or in-person health checks – e.g. ask about symptoms close contacts, and testing and diagnosis status.

VI. Covered Contractor Compliance

A. Designations

- The covered contractor must designate a person(s) to coordinate and implement the requirements of EO 14042.
- The designated person(s) is responsible for ensuring communication of the covered contractors' compliance with everyone who may be at the worksite.
- The designated person(s) must ensure that covered contractor employees comply with the requirements of EO 14042 related to the showing or provision of providing proper vaccination documentation.

B. Interaction with OSHA ETS/Other Requirements

- Covered contractors must comply with the requirements set forth in the Task Force Guidance regardless of whether they are subject to other workplace safety standards – e.g. CMS Rule or OSHA ETS.

PART II – REQUESTS TO BARGAIN

At the outset, it is important to note the following. EO 14042 constitutes a vaccine mandate for employees of covered federal contractors. In that regard, EO 14042 is qualitatively different than either the OSHA ETS for Health Care and the OSHA ETS for General Industry. In turn, the bargaining considerations are different. And, as a result, with respect to the vaccine mandate, there may be fewer areas in which to bargain.

As noted above, for many Local Unions, their International Union may be attempting to negotiate a chain or industry wide agreement regarding the implementation and effects of the new rules. Before a Local Union requests to bargain with an employer with whom the Local Union has a bargaining relationship, the Local Union should check with their International Union.

For the purpose of this Memorandum, we are simply identifying areas and topics in which Local Unions may choose to request bargaining with their employers.

Finally, we note that there is a difference in bargaining between bargaining over the decision to implement a policy (decisional bargaining) and effects bargaining. This is a somewhat complicated area of the law, and it is somewhat dependent upon the language of the applicable collective bargaining agreement. In turn, as noted previously, the purpose of this Memorandum is to simply identify areas and topics in which the Local Union may choose to address regardless of the type of bargaining that the Local Union engages in with the employer.

I. Process for Obtaining an Exception from a Vaccination Mandate

- Certain employees may be entitled to an exception from a vaccination mandate. A Local Union may choose to bargain over how the process of obtaining a religious exemption or an ADA exemption will occur.
- Such bargaining may include the time for which the employee has to obtain the necessary paperwork to submit for the exemption.
- Such bargaining may include the person(s) responsible for reviewing the requests, and a Local Union could propose that the requests be reviewed without identifying the person making the request to ensure fairness.

II. Effect of a Positive Test

- EO 14042 does not require employers to compensate employees for time spent in quarantine following a positive test. A Local Union may choose to bargain over whether employees who have tested positive for COVID-19 should receive paid leave, unpaid leave, or some other type of leave as a result of a positive test.
- A Local Union may also choose to bargain over whether absences associated with a positive COVID-19 test should count towards absences under the employer's attendance policy.

III. Obtaining a Vaccination

- EO 14042 does not require employers to provide any paid leave for employees to obtain each dose of the COVID-19 vaccine. A Local Union may choose to bargain over paid time to obtain each dose of the vaccine.
- A Local Union may also choose to bargain with the employer regarding whether the employer will set up onsite vaccination clinics so as to allow employees to obtain the vaccine at the employer's location.
- EO 14042 does not require employers to compensate employees for obtaining the vaccine during non-work hours if the employee choose to obtain the vaccination during non-work hours, a Local Union may propose that the employer compensate employees who choose to obtain the vaccine during non-work hours.

IV. Side Effects – Paid Leave

- EO 14042 does not require employers to provide a reasonable amount of paid time for employees who suffer side effects from the vaccine.
- A Local Union may choose to propose that employees should be provided as much time as necessary to recover from any side effects.
- A Local Union may also propose that such time constitute paid time.

V. Subsequent Positive Test

- EO 14042 does not provide for any paid leave if a vaccinated employee subsequently has a breakthrough infection. A Local Union may propose that

vaccinated employees receive paid leave if such employee suffers from a breakthrough infection.

VI. Discipline

- Local Unions should think about whether they want to make any proposals regarding an employee's failure to comply with the employer's policy.

VII. Continued Mitigation Efforts

- Local Unions may also choose to make proposals related to continued mitigation efforts by the employer which include, but are not limited to, contact tracing, physical distancing, etc.

The foregoing list of areas and/topics of potential areas of bargaining is not meant to be exhaustive. It is simply meant to provide a guide for Local Unions as Local Unions and employers begin to navigate EO 14042 and its effects upon employees in the workplace.

CONCLUSION

This Memorandum is not intended as general legal advice. The contents of the Memorandum are intended to convey general observations of EO 14042 and its effects upon Local Unions. In turn, if a Local Union has specific questions concerning a matter contained in this Memorandum, the Local Union should consult its legal counsel and/or International union to determine how to proceed.