

Bond

Legal Update – Winter 2021

Colin Leonard, Esq.
Construction Conference
Dannible & McKee, LLP
December 15, 2021



Speaker



Colin M. Leonard

Member

cleonard@bsk.com

One Lincoln Center

110 West Fayette St

Syracuse, NY 13202-1355

(315) 218-8118

(315) 218-8100 fax

Roadmap

- NY HERO Act
- Marijuana in NY – Recent Changes
 - Recreational Marijuana Use for Adults (21+)
 - Medical Marijuana – Review & Update
- Amended New York Whistleblower Law
- Vaccine Mandates
 - OSHA COVID-19 Emergency Temporary Standard
 - Executive Order 14042– COVID-19 Safety Mandate for Federal Contractors

NY Health and Essential Rights Act (NY HERO Act)

- Occupational Airborne Infectious Disease Exposure Prevention (NYLL § 218-b)
 - Effective July 4, 2021
 - All private employers (no numerosity threshold)
- Workplace Safety Committees (NYLL § 27-D)
 - Effective November 1, 2021
 - Private employers with at least 10 employees

NYLL 218-b – Occupational Airborne Infectious Disease Exposure Prevention

- Who does this apply to?
 - Only applies to **private** employers with worksites in NYS
 - Covers a broad range of workers (not just employees)
 - Only applies to an “airborne infectious agent or disease” designated by the Commissioner of Health as highly contagious communicable disease that presents serious risk of harm to public health
- **Does not apply to** any seasonal or endemic infectious agent or disease (like the seasonal flu)
- **Does not apply to** “[a]ny employee within coverage of a temporary or permanent standard adopted by [OSHA] setting forth applicable standards regarding COVID-19 and/or airborne infectious disease agents and diseases”

NYSDOL Published Model Plans & Standard

- Airborne Infectious Disease Exposure Prevention Standard
 - Minimum standard/requirements
- General Model Airborne Infectious Disease Exposure Prevention Plan
- Industry Specific Model Airborne Infectious Disease Exposure Prevention Plans (available on NYDOL HERO Act website)
 - Agriculture, Construction, Delivery Services, Domestic Workers, Emergency Response, Food Services, Manufacturing and Industry, Personal Services, Private Education, Private Transportation, Retail

Adoption of Prevention Plan

Covered employers have two options:

1. Adopt Applicable DOL Model Prevention Plan

OR

2. Develop Alternative Prevention Plan That Meets or Exceeds Minimum Standards Provided in Model Standard

Note Additional Requirements:

a) Employer must develop plan:

- Pursuant to an agreement with the collective bargaining representative (if any), **OR**
- With meaningful participation of employees

For all aspects of the plan

AND

b) Plan must be tailored and specific to hazards in specific industry and work sites of the employer

Critical Compliance Deadlines

- **Adoption of Plan**

- Statute: By **August 5, 2021**, private employers must adopt either a model prevention plan or an alternative plan that meets/exceeds minimum standard
- Special rules apply is creating an “alternative plan”
 - Agreement with collective bargaining representative, **or**
 - “Meaningful participation from employees”
 - Tailored and specific to hazards in specific industry and worksites

- **Verbal Review**

- Statute & Guidance: Employers must conduct a “verbal review” of policies, employee statutory rights, and the prevention plan
 - During outbreak of airborne infectious disease
 - Before designated/declared outbreak???

Additional Requirements

- **Written Notice / Posting**

- Statute: Employers must provide copy of the adopted plan to all employees in primary language within 30 days of adoption, or by **September 4, 2021** (within 60 days from NYSDOL published models/standard)
- Post plan in visible and prominent location in each worksite
- Other additional scenarios, including (per Guidance) if there is a designated outbreak
- Employee Handbook

- **Training**

- Guidance: Required once plan is “activated” during a designated outbreak

NYS HERO ACT

Protecting New York Workers from Airborne Diseases

The New York Health and Essential Rights Act (NY HERO Act) was signed into law on May 5, 2021. The law mandates extensive new workplace health and safety protections in response to the COVID-19 pandemic. The purpose of the NY HERO Act is to protect employees against exposure and disease during a future airborne infectious disease outbreak.

On September 6, 2021, Governor Kathy Hochul announced the designation of COVID-19 as an airborne infectious disease under the HERO Act. This designation requires all employers to implement workplace safety plans.

Under this new law, the New York State Department of Labor (NYS DOL), in consultation with the NYS Department of Health, has developed a new Airborne Infectious Disease Exposure Prevention Standard, a Model Airborne Infectious Disease Exposure Prevention Plan, and various industry-specific model plans for the prevention of airborne infectious disease. Employers can choose to adopt the applicable policy template/plan provided by NYS DOL or establish an alternative plan that meets or exceeds the standard's minimum requirements.

The airborne infectious disease exposure prevention plans must go into effect when an airborne infectious disease is designated by the New York State Commissioner of Health as a highly contagious communicable disease that presents a serious risk of harm to the public health.

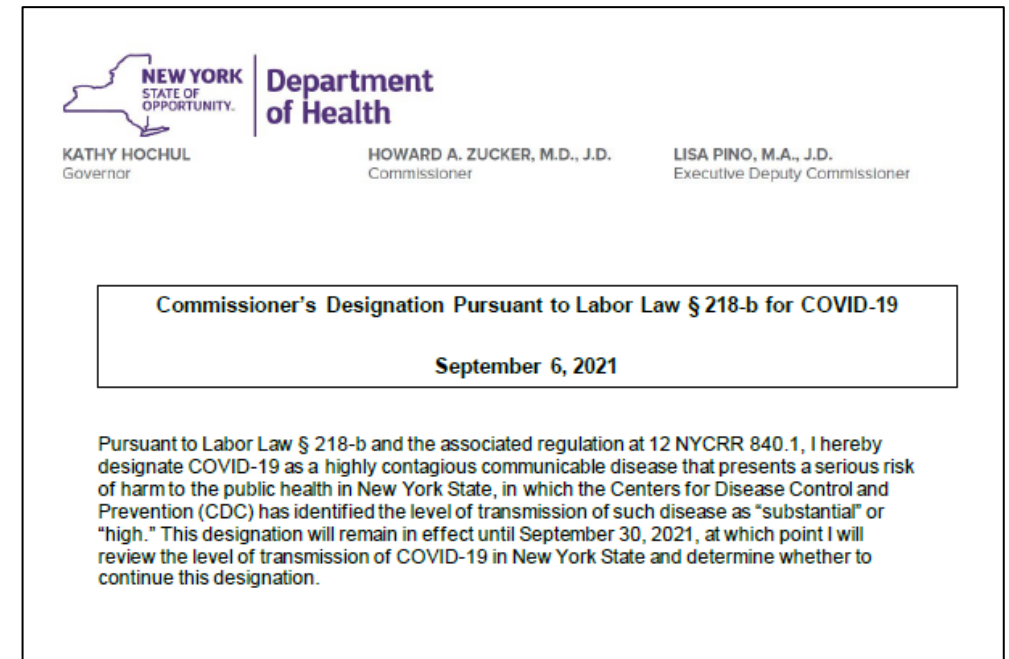
The standard and model plans are available in English and will be available in Spanish in the coming days. Employers are required to provide a copy of the adopted airborne infectious disease exposure prevention plan and post the same in a visible and prominent location within each worksite. Templates and resources are available below.

DOL will be sharing more details about this law in the near future. Please check this website for updates.

Designation by Commissioner of Health

- September 6, 2021 – Commissioner of Health designated COVID-19 as a “highly contagious communicable disease that presents a serious risk of harm to the public health.”

Magic words → ACTIVATE PLAN!



Designation Extended...



KATHY HOCHUL
Governor

Department
of Health

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

Commissioner's Designation Pursuant to Labor Law § 218-b for COVID-19

September 30, 2021

On September 6, 2021, pursuant to Labor Law § 218-b and the associated regulation at 12 NYCRR 840.1, I designated COVID-19 as a highly contagious communicable disease that presents a serious risk of harm to the public health in New York State, in which the Centers for Disease Control and Prevention (CDC) has identified the level of transmission of such disease as "substantial" or "high." I hereby continue this designation until October 31, 2021, at which point I will review the level of transmission of COVID-19 in New York State and determine whether to continue this designation.

Extended again...



KATHY HOCHUL
Governor

Department of Health

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

Commissioner's Designation Pursuant to Labor Law § 218-b for COVID-19

October 31, 2021

On September 6, 2021, pursuant to Labor Law § 218-b and the associated regulation at 12 NYCRR 840.1, I designated COVID-19 as a highly contagious communicable disease that presents a serious risk of harm to the public health in New York State, in which the Centers for Disease Control and Prevention (CDC) has identified the level of transmission of such disease as “substantial” or “high.” I hereby continue this designation until December 15, 2021, at which point I will review the level of transmission of COVID-19 in New York State and determine whether to continue this designation.

Implementation of Exposure Prevention Plans

Standard:

- When designation is made by the Commissioner of Health each employer shall:
 - Immediately review the worksite's exposure prevention plan and update the plan, if necessary, to ensure that it incorporates current information, guidance, and mandatory requirements issued by federal, state, or local governments related to the infectious agent of concern
 - Finalize and promptly activate the worksite exposure prevention plan;
 - Provide the verbal review;
 - Provide each employee with a copy of the exposure prevention plan in English or in the language identified as the primary language of such employees, if available, and
 - Post a copy of the exposure prevention plan in a visible and prominent location at the worksite (except when the worksite is a vehicle); and
 - Ensure that a copy of the exposure prevention plan is accessible to employees during all work shifts.

Implementation of Exposure Prevention Plans

Standard:

- While the designation is in effect:
 - Assign enforcement responsibilities and ensure that enforcement takes place;
 - Monitor and maintain exposure controls;
 - Follow updates to guidance;
 - Designate one or more supervisory employees to enforce compliance with the plan. *Must be a supervisory employee

Verbal Review/Training

- **Standard:** “The employer ***shall*** conduct a verbal review of employer policies, employee rights under [the Standard] and section 218-b of the labor law, and the employer’s exposure prevention plan set forth herein...”

Verbal Review/Training

Model Plan(s): “When this plan is activated, all personnel will receive training which will cover all elements of this plan and the following topics:

1. The infectious agent and the disease(s) it can cause;
2. The signs and symptoms of the disease;
3. How the disease can be spread;
4. An explanation of this Exposure Prevention Plan;
5. The activities and locations at our worksite that may involve exposure to the infectious agent;
6. The use and limitations of exposure controls
7. A review of the standard, including employee rights provided under Labor Law, Section 218-B.”

“The training will be:

1. Provided at no cost to employees and take place during working hours. If training during normal work hours is not possible, employees will be compensated for the training time (with pay or time off);
2. Appropriate in content and vocabulary to your educational level, literacy, and preferred language; and
3. Verbally provided in person or through telephonic, electronic, or other means.”

Protected Activities – Retaliation Prohibited

1. Exercising rights under Section 218-b or under applicable airborne infectious disease exposure prevention plan
2. Reporting violations of Section 218-b or applicable airborne infectious disease exposure prevention plan to state, local, federal government entity, public officer, elected official
3. Reporting airborne infectious disease exposure concern to, or seeking assistance or intervention with respect to airborne infectious disease exposure concerns to their employer, state, local, federal entity, public officer, elected official

Protected Activities – Retaliation Prohibited

4. Refusing to work where:

- Employee reasonably believes, in good faith
- Such work exposes him/her or other works or the public to unreasonable risk of exposure to an airborne infectious disease
- Due to existence of working conditions that are inconsistent with laws, rules, policies, orders of any governmental entity, including but not limited to minimum standards in model prevention policy

Provided that:

- The employee or another employee or employee representative notified the employer of the inconsistent working conditions **and** employer failed to cure conditions

Or

- Employer had or should have had reason to know about the inconsistent working conditions **and** maintained the inconsistent working conditions
(i.e., didn't fix them)

Civil Penalties

“First Time Offenses”

- Failure to adopt an airborne infectious disease exposure prevention plan: **\$50 per day**
- Failure to abide by an adopted prevention plan: **\$1,000 - \$10,000**

“Subsequent Offenses” (Prior Violation in Preceding 6-years)

- Failure to adopt an airborne infectious disease exposure plan: **\$200 per day**
- Failure to abide by an adopted prevention plan: **\$1,000 - \$20,000**

Private Right of Action (Lawsuit)

- Civil action to seek injunctive relief in court against employer alleged to have violated airborne infectious disease exposure prevention plan **in a manner that creates a substantial probability that death or serious physical harm could result to the employee** from a condition which exists, or from one or more practices, means, methods, operations, processes adopted/in use by employer at worksite **UNLESS** employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation.
- Court can grant injunctive relief, costs, reasonable attorneys' fees

Where are we now with NYLL 218-b?

- Covered employers should continue to have their NY HERO Act plans in place while designation remains in effect...
- Continue to monitor for developments or changes in CDC and NYSDOH recommendations for administration of your plan
 - Return to work
 - Face coverings and social distancing
 - Etc.
- December 15, 2021 → Designation is subject to review
 - To be extended???
 - Will follow CDC transmission tracking...

NYLL 27-D – Workplace Safety Committees

- **Who is covered?** Private employers with at least 10 employees
- **Obligation?** “Employers shall permit employees to establish and administer a joint labor-management workplace safety committee”
 - Allows employees to establish and administer joint labor-management workplace safety committees
- **Effective?** November 1, 2021
- NYSDOL has promised to issue guidance “before” November 1, 2021...

Workplace Safety Committees

- **Composition:** Composed of employee and employer designees
 - At least 2/3 must be “non-supervisory” employees
 - “Co-chaired” by representative of employer and non-supervisory employee
- **Selection:** “employee” members
 - By and from among non-supervisory employees
 - Where there is a collective bargaining agreement → collective bargaining representative responsible for selection
- **How many committees?**
 - Geographically distinct work sites may have own committee, as necessary
 - If employer already has a workplace safety committee that is otherwise consistent with the requirements “exempted” from creating an additional safety committee under this section

Prohibition on Employer Interference

- Employers must not interfere with:
 - Selection of employees who serve on committee or who serve as workplace safety designee
 - Employees' performance of authorized duties

Authorized Duties of Safety Committee

- Workplace safety committee and workplace safety designee authorized to:
 - Raise health and safety concerns, hazards, complaints, violations
 - Employer must respond
 - Review any policy put in place in the workplace required by any provision of the Chapter relating to occupational safety and health and provide feedback
 - Review adoption of any policy in workplace in response to any health or safety law, ordinance, rule, regulation, executive order or related directive
 - Participate in any site visit by governmental health and safety agency (unless otherwise prohibited by law)
 - Review any report filed by the employer related to health and safety of workplace
 - Regularly schedule a meeting during work hours at least once per quarter that may no last longer than 2 hours

Training

- Employers must permit safety committee designees to attend training on:
 - Function of worker safety committees
 - Rights established under Section 27-D
 - Introduction to occupational safety and health
- Limited to max of 4 hours
 - Unclear if this is one time training per employee, or something else...
- Without loss of pay (read: paid)

Retaliation

- Retaliation provisions apply here too
 - Participation in activities or establishment of workplace safety committee
 - Incorporates remedies for retaliation under existing Article 7 of NYLL

Guidance – Status

- NYSDOL had “promised” to issue guidance before this part of the NY HERO Act went into effect but has yet to do so...

Collective Bargaining Agreements

- Obligations under either section are waivable by CBA
 - NOTE: For waiver to be valid, it must explicitly reference the section(s)
- Nothing in either section diminishes the rights, privileges, or remedies of an employee under CBA

Marijuana in NY



Marijuana Legalization

- Big picture overview:
 - As of March 31, people 21+ may possess and ingest/smoke cannabis.
 - May publicly possess up to 3 ounces of cannabis and 24 ounces of marijuana concentrates.
 - May not legally purchase cannabis in NY at this point (but can in other states).
 - Regulations needed: will be able to possess 5 pounds of marijuana at home so long as it is in a secure location; will be able to grow 3 mature plants and 3 immature plants
 - Localities may opt out of retailer sales/cannabis cafes but will not receive tax revenue if they do so.
 - 9% state tax, 4% local tax (1% to counties, 3% to cities, towns, villages).

Amendments to NY Labor Law 201-d

- The legislation amends NY Labor Law Section 201-d.
 - Section 201-d protects employees' rights to engage in certain recreational activities outside of work without discrimination, discipline, or termination from the employer.
 - One of these permitted “recreational activities” is the “legal use of consumable products.”
 - The new law adds: “An individual’s legal recreational activities, including cannabis in accordance with state law, outside work hours, off the employer’s premises, and without use of the employer’s equipment or other property” to the list of activities protected by Section 201-d.

Amendments to NY Labor Law 201-d

- Employees lose the protection of the law for recreational marijuana usage if the otherwise legal use:
 - Takes place during working hours
 - Takes place on the employer's premises
 - Takes place with the use of the employer's equipment or other property
 - Creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest

Impairment Test

- Employers may, however, take adverse actions against employees when the employee is “impaired” by the use of cannabis, meaning:
 - The employee “manifests specific articulable symptoms while working, that decrease or lessen the employee’s performance of the duties...of the employee’s job description,”

-OR-

- Such symptoms “interfere with an employer’s obligation to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health law.”

Impairment

- The NY Law does not further define “specific articulable symptoms”
 - Guidance: No dispositive or complete list of symptoms of impairment
 - Objectively observable indications that employee’s performance of the duties of the position are decreased or lessened
 - E.g., operation of heavy machinery in an unsafe and reckless manner may be considered an articulable symptom of impairment
 - Drug testing cannot serve as basis for employer’s conclusion that employee is impaired because the tests do not currently demonstrate impairment
 - Smell of cannabis alone is not evidence of articulable symptoms of impairment

Impairment

- Training for supervisors on symptoms of impairment
 - Detecting and documenting physical signs and symptoms of marijuana use and impairment
 - Performance concerns – documentation!
- Document suspected impairment and articulable symptoms contemporaneously

Implications for Other Laws

- Employers may take adverse actions against an employee that are required by state or federal statute, regulation, ordinance, or other state or federal government mandates.
- Employers may take adverse actions against an employee if the employer's compliance with the new 201-d section would require the employer to “commit any act that would cause the employer to be in violation of federal law or would result in the loss of a federal contract or funding.”

Federal Law Reconciliation

- Marijuana remains a controlled substance illegal under the Controlled Substances Act (CSA).
- However, courts have been reluctant to support employers in terminating employees because of the CSA, under the theory that the laws are merely “in tension” with one another, and not “actual conflict.”
 - That is, the CSA does not discuss employment, and therefore, state laws on marijuana in the workplace are not preempted by it.

Federal Law Reconciliation

- OSHA's General Duty clause requires employers to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious injury."
 - However, courts have found no "actual conflict" with OSHA and employment-related marijuana laws.
- The Drug Free Workplace Act (DFWA) requires federal contractors and grantees to maintain a drug-free workplace.
 - Courts found "no actual conflict."
- NY law has an exception for federal contractors, or those subject to federal law. (Ex. DOT regulations).
 - BUT, not that simple... more on this on next slide

DOT Drug and Alcohol Testing

- FMCSA/DOT regulations require compliance with drug and alcohol testing program regulations for CDL drivers and/or those in safety sensitive functions
 - NOTE: These regulations require employee to be removed from the safety sensitive function for positive drug test, **but** do not require disciplinary action of any sort.
 - Employers with FMCSA/DOT subject employees should work with counsel to modify existing drug and alcohol policies.

Drug Testing

- Many employers impose pre-employment, reasonable suspicion, and post-accident drug testing for employees.
 - Marijuana remains detectable in the body for up to 30 days following consumption.
 - A positive test, then, is not the sole basis upon which an employee may be disciplined: “impairment” with an impact on performance or safety also must be found.
 - **NOTE**: NYC prohibits pre-employment testing for marijuana (except in limited circumstances)

Review and Revise Existing Policies

- Employers should review and revise existing drug testing and prohibition policies.
 - May consider a separate policy on recreational and medical marijuana.
 - Distinct policies made need to be written for employees: Ex. Drivers are covered by the DOT laws, and office employees who are not.
- Policies may continue to prohibit marijuana use consistent with the new Section 201-d
 - Prohibiting use or possession on site, with employer's equipment, or on working time.
 - Prohibiting employees from coming to work impaired.

New York Whistleblower Law

- Significant amendments to the whistleblower law to permit more claims to be brought against employers
- Amended in November 2019
- Changes take effect on January 26, 2022
- Before: law was relatively narrow in scope and only protected an employee who disclosed employer activity that violated a law relating to public health or safety or healthcare fraud.

New York Whistleblower Law

- NY Labor Law Section 740
 - Includes all private sector employers
 - Includes employees, **former employees and independent contractors**

New York Whistleblower Law

- **New law** – dispenses with the requirement that an employee first notify an employer of the alleged violation before reporting it to a public body. After the amendment, an employee need only make a “good faith effort” to inform the employer.
- No “good faith effort” required if employee reasonably believes
 - Imminent danger to public health or safety
 - Thinks the employer may destroy evidence
 - Thinks physical harm will result
 - Or if the employer is already aware of the activity and will not correct it

New York Whistleblower Law

- ***Scope of Protected Activity Broadened Substantially***
 - Employee “reasonably believes”
 - Employer activity violates ANY “law, rule or regulation”
 - Or poses a substantial and specific danger to public health and safety

IMPORTANT: no longer necessary for employee to prove that the employer conduct actually was in violation of a law, rule or regulation. An employee’s reasonable belief is enough

COVID-19 Vaccines



OSHA ETS Timeline

- September 9: President announces OSHA will issue an emergency COVID rule within a few weeks.
- Also September 9: Overheard at 200 Constitution Ave NW, Washington DC, “wait, what did he just say?”
- November 4: OSHA announces the rule will be published the next day in the Federal Register.
- November 5: OSHA publishes the rule in the Federal Register.
- November 6: Fifth Circuit stays the rule, citing “grave statutory and constitutional issues,” orders expedited briefing.
 - **Nationwide Injunction – Rule is effectively “On Hold” for now...**
- November 16: Multidistrict Lottery – Sixth Circuit wins
 - Sixth Circuit Briefing Schedule: No ruling on State before first ETS Deadline
 - Stay Tuned; work with legal counsel to create plan

OSHA ETS – Basic Overview

- Applies to employers with 100+ employees (as of Nov. 5, 2021)
- Exceptions for:
 - Employees covered by OSHA Healthcare ETS
 - Employees covered by Federal Contractor mandate
 - Employees who do not report to a workplace where other individuals such as coworkers or customers are present
 - Employees while they are working from home
 - Employees who work exclusively outdoors
 - Must work outdoors on all days
 - Must not routinely occupy vehicles with other employees as part of work duties; this is considered indoor time
 - De minimis use of indoor spaces where other individuals may be present is allowed
 - Time spent indoors will be added up, cumulatively

OSHA ETS – Basic Overview

- Requires covered employers to develop/adopt compliant written policy (OSHA has sample policy templates)
 - Either mandatory vaccination policy; or
 - Vax or test + mask policy
- Recognizes accommodations for medical/disability, sincerely held religious beliefs
 - Includes medically recognized reason for delay of vaccination
 - Medical contraindications

OSHA ETS – Basic Overview

- Originally by December 5 – Employers must maintain a roster of employee vaccination status
 - Very specific list of “acceptable documentation”
- Originally by December 5 – Provide paid leave for:
 - Vaccinations (4 hours per vaccine)
 - For recovery from vaccination (reasonable amount of time– “at least 2 days” or paid sick leave)
 - Guidance on when employers may require employees to use existing paid sick leave and when not

OSHA ETS – Basics Overview

- Testing
 - Generally every 7 days for non-vaccinated employees (including those who are granted an accommodation)
 - Can be OTC test, but if self-administered must be read by employer
- Prompt notification of COVID-19
 - Employers Must: Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis and remove these employees from the workplace until they can return to work as per the ETS.
- Employers Must Also Provide Employees with the following:
 - Key Things to Know About COVID-19 Vaccines,” available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html>
 - That they can’t be retaliated against. See [fact sheet](#); and
 - The criminal penalties for false statements. See [fact sheet](#)

OSHA ETS – Basic Overview

- Face coverings for unvaccinated
 - Exceptions:
 - When an employee is alone in a room with floor to ceiling walls and a closed door.
 - For a limited time while the employee is eating or drinking at the workplace or for identification purposes in compliance with safety and security requirements.
 - When an employee is wearing a respirator or facemask.
 - Where the employer can show that the use of face coverings is infeasible or creates a greater hazard
- Employers not enforcing OSHA's newest ETS could be cited by the agency and face a fine of up to \$13,653 for each serious violation. A willful violation, essentially an employer deliberately disregarding the mandate, could lead to a fine as high as \$136,532.

Federal Contractors – Executive Order 14042

- September 9, 2021 → President Biden signed Executive Order 14042 “Ensuring Adequate COVID Safety Protocols for Federal Contractors”
- September 24, 2021 → Safer Federal Workforce Task Force issues guidance
 - **Updated November 10, 2021**

Federal Contractor Guidance Requirements

1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation (medical or sincerely held religious beliefs);
2. Compliance by individuals, including covered contractor employees and visitors, with the guidance related to masking and physical distancing while in covered contractor workplaces; and
3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

“Phase-In”

- The Executive Order directs federal agencies to incorporate the new clause as follows:
 - in new contracts awarded on or after Nov. 14, 2021;
 - in new solicitations issued between Oct. 15, 2021 and Nov. 14, 2021;
 - in extensions or renewals of existing contracts and orders awarded on or after Oct. 15, 2021; and/or
 - in options on existing contracts and orders exercised on or after Oct. 15, 2021.

Coverage

- Applies to any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument, if:
 1. it is a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property;
 2. it is a contract or contract-like instrument for services covered by the Service Contract Act, 41 U.S.C. 6701 *et seq.*;
 3. it is a contract or contract-like instrument for concessions; or
 4. it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

“Contract or Contract-Like Instrument”

- Broad definition, follows USDOL’s proposed rule “Increasing the Minimum Wage for Federal Contractors”
- “[A]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law...includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services and another party to pay for them...”
 - Includes all contracts and any subcontracts of any tier thereunder (except those solely for provision of products)
 - Procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement...purchase orders, notices of awards, awards, job orders...

Coverage

- Executive Order clearly states that it **does not apply** to:
 - 1.grants;
 - 2.contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act;
 - 3.contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold (which is currently \$250,000);
 - 4.employees who perform work outside the United States or its outlying areas; or
 - 5.subcontracts solely for the provision of products.
- **Note**: Agencies encouraged to exercise their discretion to incorporate clause even before they are required to do so.

Broad and Sweeping

- Caution: Executive Order and Guidance provide federal agencies and contractors with discretion to incorporate new clause into contracts and contract-like instruments that are not directly covered by the Order

Vaccine Mandate

- **What is required?** Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19
- **Who must be vaccinated?** “All covered contractor employees”
 - Guidance defines “covered contractor employee” as “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.”

Vaccine Mandate

- **By when?**

- ~~December 8, 2021~~ ~~January 4, 2021~~ **January 18, 2022**
- After that date, 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.
- Note: Other safety protocols in the guidance must also be adhered to (masking, social distancing, etc.)
- Note: Contractors working at federal worksites will be required to comply with safety protocol.

Vaccine Mandate

- Is there a testing opt out?
 - No
- Does the federal contractor guidance recognize accommodations?
 - Yes, but only for those recognized under law such as for medical/disability, and sincerely held religious beliefs
 - Guidance does recognize that there may be legitimate and medically recognized reasons for delay of vaccination
 - Must be evaluated on an individualized basis
- Do contractors have to flow down the new clause into subcontracts?
 - Yes, until the subcontract is solely for the provision of products
- Do employers have to immediately terminate employees who are not fully vaccinated by January 18, 2022?
 - Not a cliff; guidance seems to allow some flexibility for education, counseling, followed by discipline

Don't Forget!

- Guidance also includes safety measures
 - Must ensure all individuals and visitors comply with published CDC guidance for masking and physical distancing at covered contractor workplace
 - Areas of high or substantial community transmission, all must wear masks in indoor settings (limited exceptions)
 - Fully vaccinated individuals do not need to physically distance
 - Must check CDC COVID-19 Tracker at least weekly to determine proper workplace safety protocol
 - Even if the transmission reduces from high/substantial to moderate/low, level must remain at the lower level for at least 2 consecutive weeks before reducing safety protocols

Don't Forget!

- Designate a person (or persons) to coordinate implementation and compliance
 - Must ensure that information on required COVID-19 workplace safety protocols is provided to covered contractor employees and other individuals likely to be present at covered contractor workplaces
 - Can be communicated by email, websites, memoranda, flyers, or other means, and posting signage in workplaces
 - Includes communicating workplace safety protocols and requirements related to masking/physical distancing to visitors and others present at the workplace
 - Ensure guidance and protocols are complied with (including showing proper vaccination documentation)

Practical Tips

- Review contracts and solicitations for incorporation of new clause or communication from agency or contractors
- Consult with legal counsel regarding how to proceed
 - Negotiation?
 - Accept and comply?
- Resources:
 - https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf
 - <https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf>
 - <https://www.saferfederalworkforce.gov/contractors/>
 - <https://www.saferfederalworkforce.gov/faq/contractors/>

Legal Challenges

- November 30, 2021 → Judge Gregory F. Van Tatenhove granted preliminary injunction
- Eastern District of Kentucky
- Injunction limited to enforcement against covered contracts in Kentucky, Ohio, Tennessee
- Georgia – December 7, 2021, federal district court issued a nationwide order to halt enforcement of the rule
 - Biden administration has filed a notice of appeal at the Eleventh Circuit

Questions?