

BACKGROUND – ERA Policy Group

October 7, 2021

**Please note: all ERA Policy Group meetings are video conferences via RingCentral. [Click here to log-on.](#)*

1. **Welcome (3 minutes: 11:00 a.m. – 11:03 a.m.)**
2. **Discussion: [Safer Federal Workforce Task Force – Federal Contractor Vaccine Guidance](#) (10 minutes: 11:03 a.m. – 11:13 a.m.)**

This is a discussion the NSBA Board of Trustees had at our recent meeting, as well as the LAC, however, it warrants further discussion within the Policy Group. President Joe Biden announced sweeping new federal vaccine requirements for as many as 100 million Americans – private-sector employees as well as health care workers and federal contractors – in an all-out effort to curb the surging COVID-19 delta variant.

On September 24, the Safer Federal Workforce Task Force issued its [initial guidance for federal contractor COVID-19 safety mandates](#). The Guidance was issued pursuant to President Joe Biden’s [“Path Out of the Pandemic”](#) Action Plan announced on Sept. 9, 2021.

Most notably, all covered federal contractors, subcontractors and their employees who work on covered contracts (i.e., those awarded or renewed as of Nov. 14, 2021) must be fully vaccinated by Dec. 8, 2021, if their contract so requires. This includes businesses of all sizes and also covers remote workers.

The enforcement mechanism with regard to contractors is largely contractual. President Biden’s [executive orders enforcing the “Path Out of the Pandemic” Action Plan](#) require federal agencies to contractually require their contractors to follow all Task Force Guidance. Therefore, once a federal contractor’s contract has been updated to include a requirement for compliance with the Guidance, the Guidance should be viewed as enforceable rules that covered contractors are bound by.

The Guidance issued on Sept. 24, 2021, is comprised of three COVID-19 safety facets:

1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
2. Compliance by individuals, including covered contractor employees and visitors, with the Task Force’s 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.

Which Contracts are Covered

President Biden's Executive Order 14042 and the Guidance both require that certain federal contracts must include a clause requiring contractors and subcontractors to abide by the Guidance. While Executive Order 14042 dictates a lengthy explanation of which contracts are covered, the Guidance instructs agencies to construe the term "contracts" broadly. Only contracts that provide services to the federal government are covered; contracts only for the provision of products are not covered.

With regard to timing of implementation:

- For contracts awarded prior to October 15, 2021, where performance is ongoing, the clause requiring compliance with the Guidance must be incorporated when the contract is renewed or extended.
- Between October 15, 2021, and November 14, 2021, agencies must include the required clause in the solicitation. For contracts awarded during this period, agencies are encouraged, but not required, to include the clause in contracts awarded during this period, unless the solicitation was issued on or after October 15, 2021.
- For contracts awarded on or after November 14, 2021, the required clause must be incorporated into the contract's terms.

If the Guidance is then updated during the ongoing term of a contract, the terms will be deemed to apply to that covered contract for the remainder of its term.

Prime contractors are responsible for ensuring that the required compliance clause is included in its first-tier subcontracts, and first-tier subcontractors are required to flow the clause down to their lower-tier subcontractors.

Vaccine Mandate

The Guidance requires that covered contractors ensure that all employees who provide services in connection with a covered contract are fully vaccinated, unless entitled to an accommodation under applicable law, by Dec. 8, 2021. Contractors must require proof of vaccination, such as a copy of the employee's vaccination card; a self-attestation as to the employee's vaccination status is not sufficient to meet the Task Force's requirements.

The Guidance does not contemplate any particular alternatives to the vaccine mandate for employees with exemptions, such as regular testing. As such, the Guidance is silent as to whether the employer would need to pay for tests if this is granted as an accommodation to the employee.

The vaccine mandate applies to contractors' in-person and remote workers, but only to those who work within the United States. It applies to all covered contractors, regardless of the size of their workforce. Covered contractors do not need to provide on-site vaccination to employees.

Masking and Physical Distancing

The Guidance requires that all covered contractor employees and visitors must comply with the Centers for Disease Control and Prevention's (CDC) masking and physical distancing guidelines when in a covered contractor workplace.

Currently, the CDC's guidance states that in areas with high or substantial community transmission, all individuals (including fully vaccinated people) must wear masks indoors, but fully vaccinated people do not need to physically distance. Individuals who are not fully vaccinated must wear a mask indoors and in certain outdoor settings, regardless of the level of community transmission, and they must remain a distance of at least six feet from others at all times (where feasible).

Designating a Person to Coordinate COVID-19 Workplace Safety Efforts

Covered contractors must designate a person or persons to coordinate implementation of and compliance with the Guidance at covered contractor workplaces. The designated individual must ensure that information on masking and distancing is distributed to covered employees and all other individuals likely to be present at the workplace. The designated individual may also be responsible for ensuring that all employees provide proof of vaccination.

3. Discussion: [OSHA Publishes Heat Illness Inspection Guidance](#) (10 minutes: 11:13 a.m. - 11:23 a.m.)

OSHA recently [announced](#) a three-pronged approach to establish a heat illness enforcement initiative, pertaining to both indoor and outdoor work settings: [an enforcement memorandum](#), a National Emphasis Program, and drafting of a heat illness prevention permanent standard. This Policy Group should discuss what impact this guidance will have on small businesses.

The Occupational Safety and Health Administration (OSHA), in conjunction with the [Biden administration's initiative](#) to combat climate change, [announced that it will be taking enhanced and expanded efforts to address heat-related illness in the workplace](#). Recognizing that heat is the nation's leading weather-related killer, the White House announced on September 20 that these mitigation efforts will include an enforcement initiative on heat-related hazards, a National Emphasis Program (NEP) on heat inspections, and a rulemaking process to develop a workplace heat standard.

Specifically, OSHA issued an updated [heat illness enforcement initiative](#) to guide the agency's enforcement of heat illness inspections and to inform employers what is expected of them from a heat illness prevention standpoint. The initiative prioritizes inspections of work activities on days when the heat index exceeds 80°F, and will target specific industries, including, in a change to prior focus on outdoor work, industries that may be primarily indoors or in shaded work environments. Many of these expectations appear to be modeled after Cal/OSHA's heat illness standard.

Targeted industries include Commercial Construction, Landscaping, Manufacturing, Waste Management, Transportation, and Warehousing. OSHA's proposed alleged violation

description for heat illness citations is telling and clearly contemplates indoor heat exposure, as it includes other sources of heat such as boilers, furnaces, and engines.

Background

Currently, there is no heat-related or heat stress standard in place. Instead, federal OSHA has traditionally enforced heat-related hazards through its [General Duty Clause](#), which requires employers to provide a work environment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees. Some states with state OSHA-approved plans, including [California](#) and [Washington](#), have already implemented heat illness prevention standards or to address heat related illness.

Workplace safety and labor advocates have long called upon OSHA to address heat-related workplace injuries and deaths. In 2011, [safety advocates petitioned OSHA to implement an Emergency Temporary Standard \(ETS\)](#) to address heat-related hazards in the workplace, but the petition was denied and was instead addressed by a voluntary awareness campaign on how workers can protect themselves from heat-related illness. Earlier this summer, the danger of heat-related illness on agricultural workers was [highlighted in the national media](#).

Last month, NPR published the results of an investigation it conducted with Columbia Journalism Investigations, which included federal data from the Bureau of Labor Statistics demonstrating a three-fold increase in heat related deaths the last three years compared to the 1990s. In response to NPR's investigation, OSHA Acting Director Jim Frederick [told NPR that implementing a heat standard was a priority for the Biden administration](#).

According to a [Department of Labor press release](#) announcing the plan, 43 workers died from heat-related illness in 2019, and at least 2,410 suffered serious injury and illness. The economic loss from heat hazards is estimated to be at least \$100 billion annually, which is expected to double by 2030.

What to Expect

In its announcement, OSHA outlined four steps it is taking to protect workers from heat exposure, beginning as early as this month. These steps related to workplace safety include:

- **Developing a Workplace Heat Standard** – OSHA announced the issuance of an Advance Notice of Proposed Rulemaking (ANPRM) on heat illness prevention in outdoor and indoor work settings, including agricultural, construction, delivery workers, warehouses, factories and kitchens. The ANPRM will be published this month in the Federal Register, followed by the traditional comment period that occurs before a permanent standard is implemented.
- **Heat-Related Enforcement Initiative** – In conjunction in developing a heat-specific standard, OSHA will launch a new enforcement initiative, prioritizing heat-related interventions and workplace inspections on days when the heat index exceeds 80°F. Additional OSHA resources will be dedicated toward responding to heat-related complaints and heat-related workplace hazards.

- **National Emphasis Program** – OSHA is also finalizing a heat hazard NEP, which will target high-risk industries, set to take effect before next year’s heat season. There is currently [a Regional Emphasis Program for Heat Illness in Region VI](#), which includes Arkansas, Louisiana, New Mexico, Oklahoma, and Texas – states hit hard by seasonal heat. OSHA plans to build upon this existing program when developing the national program that will apply in all states under Federal OSHA jurisdiction.
- **Heat Illness Prevention Group** – OSHA is also forming a Heat Illness Prevention Group “to provide better understanding of challenges and best practices in protecting workers from heat hazards.” The group will include three members of OSHA’s National Advisory Committee on Occupational Safety and Health and other members from a range of sectors and industries. The group will periodically meet to address workplace heat hazards, response plans, training and engagement.

Rulemaking

This month, OSHA will take a significant step toward a federal heat standard to ensure protections in workplaces across the country by issuing an Advance Notice of Proposed Rulemaking on heat injury and illness prevention in outdoor and indoor work settings. The advance notice will initiate a comment period allowing OSHA to gather diverse perspectives and technical expertise on topics including heat stress thresholds, heat acclimatization planning, exposure monitoring, and strategies to protect workers.

The agency is also working to establish a National Emphasis Program on heat hazard cases, which will target high-risk industries and focus agency resources and staff time on heat inspections. The 2022 National Emphasis Program will build on the existing Regional Emphasis Program for Heat Illnesses in OSHA’s Region VI, which covers Arkansas, Louisiana, New Mexico, Oklahoma and Texas.

- 4. Update: Stop-Gap Spending Bill Signed into Law (5 minutes: 11:23 a.m. – 11:28 a.m.)**
No action is required by this Policy Group. It is an update on the latest activity by the House and Senate who passed legislation to fund the government until Dec. 3, with more than \$28 billion in disaster relief and \$6.3 billion to help relocate refugees from Afghanistan. President Biden quickly signed it, averting the immediate fiscal threat of a government shutdown.

At the end of last week, Congress approved and President Biden signed a “clean” short-term continuing resolution (H.R. 5305) that funds the federal government at fiscal year 2021 levels through December 3 of this year, averting a partial shutdown that otherwise would have occurred when FY 2021 ended at midnight on September 30. The Senate amended and passed a House-approved version of the CR by a vote of 65-35 on Sept. 30 before sending it back to the House to approve the revised measure by a vote of 254-175.

As originally approved in the House on September 21, H.R. 5305 called for extending government funding through December 3, providing supplemental appropriations to aid victims of recent U.S. natural disasters and assist in the resettlement of Afghan refugees, and suspending the federal debt limit through December 16, 2022.

Senate Majority Leader Charles Schumer (D-N.Y.), attempted to bring it to the floor on September 27; but that effort failed in the face of a promised filibuster from Senate Republicans, who objected to a further suspension of the debt limit. Breaking a filibuster requires a three-fifths supermajority – typically 60 votes – and Democrats were unable to convince any of their Republican colleagues to break ranks and support advancing the House measure.

Senators subsequently amended the bill to strip out the debt ceiling language and approved it on September 30 by a vote of 65-35. The Senate-approved version – including only the short-term funding extension plus the supplemental appropriations for disaster relief and refugee resettlement – was quickly sent back to the House where it was passed the same day by a vote of 254-175. President Biden signed it into law that evening.

With a funding patch in place, lawmakers have additional time to complete and pass the 12 spending bills needed to fund government operations for fiscal year 2022, which began October 1. But the temporary extension also sets the stage for a possible fiscal standoff in early December if the two chambers are unable to agree on a long-term spending plan in the coming weeks.

5. Update: Infrastructure Package Vote Delayed (8 minutes: 11:28 a.m. – 11:36 a.m.)

No action is required by the Policy Group. Senate Majority Leader Chuck Schumer (D-N.Y.), Speaker Nancy Pelosi (D-Calif.) and Senate Majority Whip Dick Durbin (D-Ill.) all publicly set Oct. 31 as the target for both the bipartisan infrastructure bill and the Democrats' Build Back Better Act spending package. The date is key because key surface transportation programs would expire on Nov. 1, after the Senate cleared a 30-day extension on Oct. 2.

House Speaker Nancy Pelosi (D-Calif.), delayed a planned September 30 vote on the Infrastructure Innovation and Jobs Act, a bipartisan bill focusing on so-called “hard” infrastructure, after progressive members of her caucus made clear that they would follow through on their promise to withhold support for the measure if Democratic leaders in both chambers do not make substantial additional progress on the Build Back Better Act, the larger “human” infrastructure measure addressing many of President Biden’s social spending priorities that is moving through Congress under filibuster-proof budget reconciliation protections.

Speaker Pelosi’s decision to delay the vote is the latest development in her continuing efforts to balance the sometimes conflicting policy priorities of moderates and progressives within her caucus – a task made even more challenging by the fact that Democrats hold a narrow majority in the House and the speaker can afford to lose no more than three votes on legislation that is unlikely to gain support from Republicans. The decision also reflects Speaker Pelosi’s stated position that she will only hold votes on bills that she knows have enough support to pass.

The Infrastructure Innovation and Jobs Act, which cleared the Senate on August 10, would invest roughly \$550 billion in new spending over the next five years on projects such as roads, bridges, transit, and broadband, and includes limited tax-related incentives and revenue offsets.

It would devote \$65 billion to expand high-speed internet access; \$110 billion for roads, bridges and other projects; \$25 billion for airports; and the most funding for Amtrak since the passenger rail service was founded in 1971. It would also begin the shift toward electric vehicles with new charging stations and fortifications of the electricity grid that will be necessary to power those cars.

Progressive Democrats had long been concerned that getting the infrastructure legislation enacted into law ahead of the Build Back Better Act might make it easier for some moderate Democrats in both chambers to vote against a large package of tax increases and new social spending, and they had previously secured a commitment from Speaker Pelosi to move the two measures in tandem.

During the run-up to the House vote in August on the congressional budget resolution authorizing the reconciliation bill, however, several moderate Democrats expressed reservations about the potential size of the tax-and-spending legislation and sought to notch a quick policy win by passing the Infrastructure Innovation and Jobs Act and sending it on to the White House for President Biden's signature. To that end, they wanted Speaker Pelosi to commit to a date for a floor vote on the infrastructure bill in exchange for their "yes" votes on the budget resolution. Pelosi accommodated the moderates and promised to bring the legislation to the House floor by September 27; but to reassure progressives that their priorities would not get sidelined, she reiterated that she was not abandoning the dual-track strategy and that the chamber would plan to contemporaneously consider the broader reconciliation package.

In recent days, however, with neither chamber apparently in a position to bring up a completed reconciliation bill for consideration, Speaker Pelosi confirmed that she would move ahead with the infrastructure legislation as scheduled. The decision to effectively decouple the two bills drew immediate criticism from House progressive Democrats. Rep. Pramila Jayapal (D-Wash.), who chairs the Congressional Progressive Caucus (CPC), maintained that up to half of the 95 House members who belong to the CPC were prepared to vote against the infrastructure proposal if leaders followed through with their plans to bring it to the floor without an agreement on budget reconciliation in hand. Such a large number of Democratic defections likely would be more than enough to derail the measure since it is not expected to draw significant Republican support.

Once Speaker Pelosi became aware of the potential progressive vote against the infrastructure package, she announced a new deadline to passing both the bipartisan infrastructure bill and the broader investment in social programs by the end of October. The party now aims to approve the plans before the Oct. 31 expiration of major transportation funding programs, which the infrastructure legislation would renew.