

BACKGROUNDER – ERA Policy Group

Nov. 4, 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: [Build Back Better Framework](#) – Climate and Environmental Provisions (10 minutes: 11:03 a.m. – 11:13 a.m.)**

President Biden on October 28 released a proposed framework for the Build Back Better Act. The administration has indicated that the framework is intended to “guide the drafting of legislative language” in Congress. And, to that end, House Democrats on October 28 released an updated version of the Build Back Better Act (text, section-by-section summary) that incorporates the policy priorities outlined at a very high level in the framework. The Policy Group will want to go through each of the provisions and determine what impact they will have on small businesses.

On Oct. 28, President Joe Biden announced a “Build Back Better” framework that outlines spending provisions described as costing \$1.75 trillion over 10 years and revenue offsets believed to add up to nearly \$2 trillion over the same period

While the language could yet change, here is what is in the draft for climate and the environment programs:

Clean Energy Tax Credits: A significant part of the draft text is devoted to clean energy tax incentives, echoing what advanced out of the House Ways and Means Committee earlier this year by establishing “base” credits that would increase five-fold for any facility that meets prevailing wage and apprenticeship requirements. The bill also includes an additional boost for projects that meet phased-in domestic content requirements, though it appears to try to address concerns from offshore wind advocates by including a lower percentage phase-in for that technology. Notably, projects looking to take advantage of direct pay rather than tax credits would also need to meet domestic content requirements.

Under the draft text, there would be a base credit rate of 0.5 cents/kilowatt hour, and a bonus credit rate of 2.5 cents/kilowatt hour for the production tax credit for wind and solar. It also includes a 6 percent base credit rate and a 30 percent bonus credit for the investment tax credit, which would be expanded to include energy storage technology. The host of green tax credits also include transmission properties, the production of electricity from nuclear power and a new tax credit to produce clean hydrogen.

Congress' top tax-writing lawmakers said they reached agreement on a structure for the clean energy tax credits that will begin with those tax incentives proposed by the Ways and Means panel for five years, and then shift to a technology-neutral approach proposed by the Senate

Finance Committee. That would move the current set of separate energy tax breaks into three emissions-based incentives for clean electricity, clean transportation, and energy efficiency.

Domestic Manufacturing: The bill also hopes to bring renewable energy manufacturing to the U.S. with tax credits for the fabrication of solar and wind components, which are currently overwhelmingly made overseas. The tax credits are largely built around Sen. Jon Ossoff's (D-Ga.) [Solar Energy Manufacturing for America Act](#), as well as tax credit rates for wind components sought by Sen. Ed Markey (D-Mass.). It is a major win for Ossoff, whose legislation got the backing of Finance Chair Ron Wyden (D-Ore.), Energy Secretary Jennifer Granholm and the Solar Energy Industries Association this summer.

Sustainable Aviation Fuels: The draft includes a refundable tax credit for sustainable aviation fuel beginning at \$1.25 per gallon for blenders that supply fuel with an at least 50 percent life cycle estimate reduction in greenhouse gas emissions in comparison with petroleum-based jet fuel. The accounting for that reduction has been closely watched by the biofuels industry over its use of methodology that conforms with the International Civil Aviation Organization. The draft text maintains the ICAO accounting.

Carbon Capture and Removal: The draft bill also includes a bolstered and extended 45Q tax credit, which offers increased tax credits for direct air capture and point-source carbon capture. Backers of carbon emissions mitigation technology point to its role in assisting difficult-to-electrify sectors, such as heavy industry, which is likely to overtake the electricity sector as the second biggest source of carbon emissions in the country. The legislation requires an electricity generating facility to capture at least 18,750 metric tons of carbon and at least 75 percent by mass of its carbon emissions. For other facilities, at least 12,500 metric tons must be captured in the taxable year.

Methane Fee: The draft text [includes a methane fee](#) that would begin at \$900 per ton for emissions reported in 2023. It would increase to \$1,200 in 2024 and \$1,500 in 2025 and each year after. The measure also provides \$775 million through grants, rebates, contracts and loans for owners and operators of oil and gas facilities to help reduce their emissions. The methane fee's inclusion in the draft is particularly notable as it had emerged in recent days as a sticking point and was left off the framework released by the White House.

Civilian Climate Corps: The bill appropriates \$4.28 billion to the Department of Labor for a climate workforce focused on climate resilience and mitigation – which constitutes the Civilian Climate Corps. The money would be appropriated to the DOL until September 2026. It also allocates \$500 million for the Interior Department through 2031 for land management projects, including those attached to federal, tribal, state, and local corps programs, as well as additional funding for current labor programs to focus on climate programs and targeting underserved communities. President Joe Biden had called for \$10 billion for a Civilian Climate Corps in his initial [American Jobs Plan](#).

Fossil Fuels: The text would also repeal the Arctic National Wildlife Refuge oil and gas program that was included in the 2017 tax legislation signed into law by former President Donald Trump. It would return all payments for the leases within 30 days. It would also prohibit the exploration, development or production of oil or natural gas on the Outer Continental Shelf in the Atlantic, Pacific and in the eastern Gulf of Mexico.

The bill would also raise Interior's royalty rate for oil, gas and coal developed on public lands from 12.5 percent to 18.75 percent, and new offshore oil and gas leases would be subject to a royalty rate of at least 14 percent. It would also set new minimum bid amounts and rental rates and charge offshore oil and gas operators new inspection fees. Companies operating offshore oil and gas pipelines would also be subject to a new owner's fee.

Electric Vehicles: The measure would provide \$1 billion for zero-emissions vehicle infrastructure, including \$200 million tagged specifically for infrastructure in rural communities and \$200 million for hydrogen fueling stations. More than \$6 billion would also be included for the U.S. Postal Service to acquire EVs and purchase charging stations. Notably, Rep. Dan Kildee's (D-Mich.) refundable EV tax credit is also included in the draft text, which could go as high as \$12,500 for vehicles assembled in the U.S. under a union-negotiated collective bargaining agreement and powered by battery cells manufactured within the United States.

Transmission: The draft bill includes \$2 billion for grants and loans to build new transmission lines and upgrade old ones with the aim of making the grid more resilient and enabling the integration of clean energy. It would also provide \$800 million for grants to facilitate siting of interstate transmission lines, as well as \$100 million for planning efforts aimed at incorporating offshore wind electricity.

The bill also includes \$200 million for efforts at the Energy Department and FERC to speed up environmental reviews, especially for offshore wind projects.

Resilience: The draft bill would give \$6 billion to the National Oceanic and Atmospheric Administration to spend on resiliency work for coastal communities, and \$1 billion for work to restore Pacific salmon and steelhead populations, which have been plagued by drought, predators, and dams.

Drinking Water: The draft measure would provide \$9 billion for programs to remove lead from the nation's drinking water systems, supplementing the \$15 billion in the [bipartisan infrastructure bill](#). That's a [historic investment](#) in solving the problem, but still far shy of the \$45 billion industry says it would take to fully remove lead from the country's infrastructure. The bill would also send \$225 million for a new low-income assistance program to help families struggling to pay their water bills. It would be run out of EPA, a shift from the program Congress stood up as part of earlier coronavirus relief legislation at the Department of Health and Human Services, which has received more than \$1 billion in funding but has been slow to get it out the door.

3. Discussion: CEQ [Seeks Comments](#) To Modify Its Regulations Implementing NEPA (10 minutes: 11:13 a.m. – 11:23 a.m.)

On October 7, 2021, the Council on Environmental Quality (CEQ) issued a notice of proposed rulemaking to modify its regulations implementing the National Environmental Policy Act (NEPA). The proposed rule, if promulgated, would expand the definition of “effects” that Federal Agencies must consider when formulating an environmental assessment or an environmental impact statement. The proposed rule would also allow Federal Agencies to promulgate more stringent regulations implementing NEPA than those promulgated by CEQ. Comments on the proposed rule are due November 22, 2021. Read the Federal Register notice and submit comments [here](#).

On October 7, 2021, the White House Council on Environmental Quality (CEQ) released its [notice of proposed rulemaking](#) for revising its implementing regulations under the National Environmental Policy Act (NEPA). NEPA is a federal law that requires all federal agencies to assess the environmental effects of any proposed actions as part of its decision making. The proposed rule is the first of a two-phase rulemaking process, which would reverse changes to NEPA that went into effect during the Trump Presidency after being in place for decades prior to such modifications.

Long expected, the proposal is the first installment on a promise of broader changes to come—reflecting the difficulty of getting a full package of revisions through the inter-agency review process. The proposed rulemaking is the first phase of a two-phase process to address the NEPA revisions undertaken by CEQ during the Trump Administration and finalized in 2020. The CEQ indicated that the purpose of the rule change is to better align the proposed provisions with the Biden Administration’s environmental policies

The CEQ’s proposal addresses three procedural provisions of the NEPA regulations: (1) the purpose and need of a proposed action, (2) removal of limitations on procedures for implementing CEQ’s NEPA regulations, and (3) the definition of “effects.”

Purpose and Need: The CEQ proposes the elimination of language in the description of the “purpose and need” section of an Environmental Impact Statement (EIS), which sets the parameters for the range of reasonable alternatives an agency considers in a NEPA review. The 1978 version of the regulations required each EIS to briefly state the purpose and need to which the agency is responding in proposed actions. The 2020 version of the regulation modified the provision by adding language requiring agencies to base the purpose and need of proposed actions on the goals of the applicant, which limited agencies from considering alternative designs that do not align with the project sponsor, usually a private party. Therefore, the proposed change would restore agency considerations to be dictated by the public interest, and remove the limitations imposed on agencies by the 2020 version of the rule.

Agency NEPA Procedures: The proposed rule change would remove limitations in NEPA’s implementing procedures that prevented agencies from imposing more stringent procedures beyond those in the regulations to allow agencies to address specific programs and the context within which they operate. Therefore, the regulations would serve as a “floor,” not a “ceiling,”

and would enable agencies to impose more stringent NEPA implementing regulations, which could only be done in the 2020 version of the rule change if the additional procedures promoted agency efficiency or were required by law. The 2020 version prohibited agencies from adding procedures or requirements beyond the CEQ regulations subject to a few limited exceptions, which departed from the CEQ's prior practice of the regulations providing a floor for review procedures. The proposal will enable agencies to adopt procedures consistent with the overall purpose of NEPA, which directs agencies to pursue the statute's goals "to the fullest extent possible."

Definition of "Effects:" NEPA requires agencies to assess the "effects" of a proposed action or alternative as part of the determination as to whether the impacts of a proposed action are "significant." The rule proposal seeks to revise the definition of "effects" contained in the earlier version of the rule by incorporating "direct" and "indirect" effects, and "cumulative impacts" into the definition of "effects" or "impacts." The 2020 version of the rule did not require agencies to analyze the effects of actions beyond their control, nor did agencies have to consider cumulative impacts from proposed actions, just those that were foreseeable with a close causal relationship to the action.

The White House announced that the rule proposal is part of the Biden Administration's "whole-of-government" approach to tackling the climate crisis and confronting environmental injustice, so that communities and decision makers will have more complete information about proposed projects, their environmental and public health impacts, as well as any alternatives.

The CEQ's Phase 2 changes are expected to be announced in the coming months, and these will propose changes to NEPA that aim to ensure full and fair public involvement in the environmental review process among other changes aimed at aligning NEPA with President Biden's environmental objectives.

The CEQ is accepting comments regarding the proposal until November 22, 2021, and companies with projects likely to be subject to NEPA review should consider the impact the revisions may have on future endeavors.

4. Discussion: OSHA [Rulemaking](#) - Heat Illness Standard (10 minutes: 11:23 a.m. - 11:33 a.m.)

This is an update from last month's discussion - please see the [Oct. 7 backgrounder](#) for more information. Public comments on the ANPRM are requested on or before December 27, 2021. On October 27, 2021, the Occupational Safety and Health Administration (OSHA) published an Advance Notice of Proposed Rulemaking (ANPRM) on "Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings." The ANPRM provides an overview of heat stress in the workplace (both indoors and outdoors) and the various measures taken to prevent it and protect workers from it. Further, the ANPRM seeks public comment on the nature and extent of hazardous heat in the workplace and interventions and controls to prevent heat-related injury and illness, including measuring heat exposures, strategies to reduce it, personal protective equipment and other controls, and worker training and engagement.

Read OSHA's ANPRM on heat stress [here](#). File comments [here](#).

A heat illness standard could be the outcome of this process and this Policy Group should determine whether NSBA should submit comments to make sure small business voices are heard during this rulemaking.

OSHA is initiating a [rulemaking](#) to develop a heat illness standard.

For decades, the Occupational Safety and Health Administration (OSHA) has enforced occupational heat illness hazards through the Occupational Safety and Health Act's General Duty Clause. OSHA has recently updated its Heat Illness Prevention Campaign materials to recognize both indoor and outdoor heat hazards, as well as the importance of protecting new and returning workers from hazardous heat. As OSHA continues to shift its enforcement focus to heat, it has begun the process to issue a heat illness standard.

On October 27, 2021, OSHA issued an advance notice of proposed rulemaking (ANPRM) for the proposed standard. The ANPRM provides OSHA's overview of the issues concerning heat stress in the workplace and of measures that have been taken to prevent it and seeks input from stakeholders on several questions during a designated notice-and-comment period.

According to the Agency, heat is the leading cause of death for all weather-related phenomena. Excessive heat exacerbates existing health problems like asthma, kidney failure, and heart disease, and can cause heat stroke and death if not treated. OSHA cites to the Bureau of Labor Statistics (BLS) Census of Fatal Occupational Injuries, exposure to excessive environmental heat stress, which has killed 907 U.S. workers from 1992–2019, with an average of thirty-two fatalities per year during that period. In 2019, there were forty-three work-related deaths due to environmental heat exposure. The BLS Annual Survey of Occupational Injuries and Illnesses estimates that 31,560 work-related heat injuries and illnesses involving days away from work have occurred from 2011–2019, with an average of 3,507 injuries and illnesses of this severity occurring per year during this period.

The ANPRM examines the four state plans with heat illness revaluations, clearly showing an intent to model federal regulations on those deemed to be successful. The ANPRM uniquely targets (1) the effects of climate change on occupational health, and (2) the inequitable effects of heat illness on disadvantaged demographic groups. OSHA provides data addressing disproportionate heat illness affecting minority employees, foreign-born employees, low-wage-earners, and pregnant employees.

OSHA also notes that a sizable percentage of heat illness incidents occur in exceedingly small businesses with ten or fewer employees. A hurdle OSHA faces in developing a standard is that small businesses will have difficulty implementing both new engineering controls (air conditioning, providing shade) and administrative controls (closely monitoring the heat exposure of employees, cooling breaks because of limited employees, lengthy periods of acclimatizing to heat prior to beginning work).

Public comments on the ANPRM are requested on or before December 27, 2021. A heat illness standard could be the outcome of this process and interested parties should consider submitting comments to make sure their voices are heard during this rulemaking.

5. Discussion: President Biden [U.S. Methane Emissions Reduction Action Plan](#) (10 minutes: 11:33 a.m. – 11:43 a.m.)

The Environmental Protection Agency proposed new draft rules on Nov. 2 that, if adopted, would drastically reduce methane emissions. The regulations, one covering existing wells and the other covering new wells, are part of a comprehensive new Methane Emissions Reduction Action Plan. The rules come as President Joe Biden seeks to reestablish U.S. leadership on global warming at the United Nations Conference on Climate Change (COP26) in Glasgow and just weeks after his administration signed the U.S. onto a global pledge to reduce methane emissions 30 percent from 2020 levels by 2030. The EPA officials are accepting public comments on the draft rules through Jan. 1.

The United States is leading the clean energy economy of the future with initiatives across a range of sectors and all stages of innovation: research, development, and deployment. The [Department of Energy](#) reports that while most energy sectors lost jobs in 2020, the sectors that continued growing amid the pandemic were wind generation, battery storage, and hybrid and electric vehicles. Globally, the [International Energy Agency](#) estimates that moving to a net-zero economy would create 30 million jobs worldwide by 2030 across energy, construction, and automotive sectors, 65 percent of which will be high-skilled jobs. The United States is committed to realizing not only the emissions reductions potential, but also the economic growth and jobs creation opportunities across key sectors.

Through tackling methane emissions, spurring innovations, and supporting sustainable agriculture, on Nov. 2, President Biden announced bold steps that will push the U.S. clean energy economy forward and create good-paying jobs. President Biden unveiled a [U.S. Methane Emissions Reduction Action Plan](#) that redoubles efforts from across the government to dramatically reduce U.S. methane emissions, cut consumer costs, protect workers and communities, maintain and create high-quality, union-friendly jobs, and promote U.S. innovation and manufacturing of critical new technologies.

The President also announced how the U.S. is partnering with countries around the world to drive innovation and deep decarbonization, including through Net-Zero World to chart pathways to deep decarbonization; the Clean Energy Demand Initiative that will facilitate greater corporate procurement of renewable energy; and the First Movers Coalition that will drive innovation by sending a demand signal for the new technologies we need in industry, aviation, and heavy-duty transportation.

Reducing Methane Emissions: Methane emissions are a major contributor to climate change, which is why President Biden is taking steps to reduce methane across the economy.

President Biden in September announced that the United States was joining with the European Union in challenging the world to meet a Global Methane Pledge and reduce the world's

methane emissions 30 percent from 2020 levels by 2030. The official launch event the second day of COP-26 announced that more than one hundred governments have now joined the pledge, including six of the world's top ten methane emitters: the United States, Brazil, EU, Indonesia, Pakistan, and Argentina.

The new [U.S. Methane Emissions Reduction Action Plan](#) is an ambitious, whole-of-government initiative that uses all available tools – commonsense regulations, catalytic financial incentives, transparency and disclosure of actionable data, and public and private partnerships – to identify and cost-effectively reduce methane emissions from all major sources. According to the White House, these actions will protect public health, promote U.S. innovation in modern technologies, and help employ tens of thousands of skilled workers across the country. The plan aims to reduce:

Oil & Gas Industry Methane Emissions: The oil and gas industry are the largest industrial source of methane emissions in the United States, responsible for approximately 30 percent of total methane emissions. That is why on January 20, 2021, the first day of his Administration, President Biden issued Executive Order 13990, directing the Environmental Protection Agency (EPA) to issue regulations under the Clean Air Act to reduce the oil and gas industry's methane emissions.

The EPA proposed new regulations that will significantly broaden and strengthen methane emissions reduction for new oil and gas facilities. In addition, for the first time ever, it will require that states develop plans that will reduce methane emissions from existing sources nationwide including from an estimated 300,000 oil and gas well sites. Overall, the proposed requirements would reduce emissions from covered sources, equipment, and operations by approximately 75 percent.

The Department of Transportation's Pipeline and Hazardous Materials and Safety Administration (PHMSA) is implementing the bipartisan PIPES Act by upgrading and expanding pipeline rules that will, among other things, require operators to cut methane leaks and excursions. And the Department of the Interior (DOI) is focusing on opportunities to tackle the venting and flaring of methane from oil and gas operations and well closures on public lands and waters.

Landfill Methane Emissions: Landfills are the second largest industrial source of methane in the United States. Building on efforts earlier this year to put in place an enforceable federal backstop plan to ensure emissions reductions from large municipal landfills, EPA is ramping up an initiative to reduce the food loss and waste that serves as a major contributor to landfill methane emissions. EPA is also boosting its voluntary landfill methane outreach program to achieve a national goal of 70 percent methane emissions capture for all landfills around the country.

Emissions by Plugging Oil & Gas Wells and Remediating Abandoned Mines: Under the President's Build Back Better plan, DOI will launch an aggressive program to plug hundreds of thousands of orphan oil and gas wells, including many that are still venting methane, employing union workers across the country. Build Back Better would scale up the current Abandoned Mine Land program, funding historic remediation efforts that would result in dramatic methane emissions reductions from thousands of currently leaking, abandoned coal mines. This scaled up program would also enlist tens of thousands of skilled workers, especially in energy communities across the country.

Agricultural Methane Emissions: In his early Executive Order on "Tackling the Climate Crisis at Home and Abroad," the President called on the Department of Agriculture (USDA) to collaborate with farmers and ranchers to identify voluntary, incentive-based approaches that will advance climate goals. In response, USDA is pursuing multiple workstreams to reduce methane emissions from the agricultural sector, including (1) the adoption of alternative manure management systems and other methane-reducing practices; (2) the expansion of on-farm generation and use of renewable energy; (3) the development of a climate-smart agricultural commodities partnership initiative and (4) increased investments in agricultural methane quantification and related innovations.

Energy, Industry, Transportation, and Other Need-to-Abate Sectors: President Biden recognizes that accelerating clean energy adoption around the world is central to the global net-zero transition. Energy represents most global emissions, and clean energy technologies that are already cost-competitive are critical for reducing emissions across the power, transportation, industry, and buildings sectors. The United States is committed to partnering with governments and business leaders around the world to drive the clean energy transition that will strengthen our economies, which is why the United States will be hosting the Clean Energy Ministerial and Mission Innovation next year.

President Biden has launched several initiatives demonstrating his commitment to partnering with entrepreneurs and innovators to catalyze the development and deployment of the modern technologies that will power the clean economy of the future. The United States is partnering with emerging economies to develop deep decarbonization strategies, mobilizing private companies to drive deployment in need-to-abate industrial sectors, strengthening adoption of renewable and nuclear energy including small modular reactors, and launching the next Energy Earthshot to accelerate innovation in carbon dioxide removal technologies.

The First Movers Coalition (FMC), led by the State Department through the U.S. Special Presidential Envoy for Climate and the World Economic Forum, is a platform for building private-sector demand to speed clean energy technology innovation and confront the climate crisis. Through this flagship public-private partnership, companies make purchasing commitments during this decade to send a clear demand signal for commercializing emerging technologies essential to achieving net-zero emissions by 2050. The FMC launches at COP-26 with more than 25 Founding Members that have each made demand commitments, including

some of the largest companies in the world across a wide range of industries with hundreds of billions of dollars in purchasing power. The buyers' clubs assembled by the FMC will create early market demand for innovations across eight "need-to-abate" sectors—steel, trucking, shipping, aviation, aluminum, concrete, chemicals, and direct air capture—which represent more than one-third of the world's carbon emissions today, a proportion set to grow in the coming decades.

Net-Zero World: In line with the objectives of the President's Build Back Better World (B3W) initiative, the Department of Energy is leading an initiative in partnership with the Department of State, USAID, USTDA, DFC and others, to accelerate global energy system decarbonization by leveraging the Department of Energy's 17 National Laboratories and deploying the diplomatic, technical, and financial expertise from across U.S. government agencies.

Together with the philanthropic community, the United States will collaborate with partner countries to provide world-class technical assistance to inform each country's energy decarbonization strategy to net zero and collaborate to implement solutions. Through this whole-of-government, comprehensive approach, the United States will help partner countries unlock private-sector financing and deliver on low-carbon development pathways through U.S. technical expertise on implementation pathways and market reforms. The first Net Zero World partner countries announced at COP 26 are Argentina, Egypt, Indonesia, Nigeria, and Ukraine.

The Clean Energy Demand Initiative (CEDI) leverages private sector commitments to deploy clean energy technologies by creating a platform for companies to send investment signals to key markets. Through CEDI, over thirty companies have signed letters of intent to procure renewable energy to offset electricity demand for a multitude of sectors, including technology, manufacturing, retail, and health. And over forty-five more companies have expressed interest in joining. Countries in turn will signal support for high level principles to create an enabling environment for corporate renewable procurement. The renewable energy demand from over seventy-five interested companies has the potential to unlock up to \$67 billion in power infrastructure, as a complement to broader sectoral investment. CEDI will serve as a platform for stakeholder engagement and country partnerships and create a venue for companies and countries to continually signal investment potential and policy plans. CEDI builds on commitments made by over 325 companies, through RE100, to move to 100% renewable energy by 2050 or earlier.

6. Update: Biden Administration issued [new FAQs](#) - Executive Order (EO) [No. 14042](#) on Ensuring Adequate COVID Safety Protocols for Federal Contractors (10 minutes: 11:43 a.m. - 11:43 a.m.)

On November 1, 2021, the Biden administration's Safer Federal Workforce Task Force issued new Frequently Asked Questions (FAQs) for federal contractors subject to Executive Order No. 14042 (EO 14042) on Ensuring Adequate COVID Safety Protocols for Federal Contractors.

Although styled as FAQs, the issuance is binding direction for contractors that have agreed to the deviation contract clauses issued to implement EO 14042 (FAR 52.223-99, DFARS 252.223-7999, etc.), as those clauses specifically require compliance with “all guidance, including guidance conveyed through Frequently Asked Questions, as amended.”

The new FAQs come as more states file or join lawsuits against the federal government to enjoin implementation of EO 14042 and the Task Force’s guidance. The new FAQs follow statements on October 27, 2021, by Jeff Zients, the White House Coronavirus Response Coordinator, that the December 8 vaccination deadline in the Task Force’s prior guidance is not a “cliff,” and that the White House does not expect contractors to immediately terminate employees who refuse to become vaccinated by December 8.

One of the questions addressed by the new FAQs is: “What steps should a covered contractor take if a covered contractor employee refuses to be vaccinated?” The answer to that question leaves it to the contractor to “determine the appropriate means of enforcement,” and suggests that a contractor in that situation may apply “its usual processes for enforcement of workplace policies, such as those addressed in the contractor’s employee handbook or collective bargaining agreements.” The FAQs encourage contractors to consider the process being used by federal agencies in this situation, which is:

“to utilize an enforcement policy that encourages compliance, including through a limited period of counseling and education, followed by additional disciplinary measures if necessary. Removal occurs only after continued noncompliance. Guidance for Federal agencies is that employees should not be placed on administrative leave while the agency is pursuing an adverse action for refusal to be vaccinated but will be required to follow safety protocols for employees who are not fully vaccinated when reporting to agency worksites.”

The foregoing Task Force’s answer presupposes procedures that most contractors are not obligated to provide for at-will employees. Regardless, the answer allows an unvaccinated covered contractor employee without an accommodation to continue working on a covered contract for a “limited period” while that employee is being counseled to avoid termination. The FAQs provide no detail on how long that limited period can last. The FAQs do require that, during this period, the employee must follow all workplace safety protocols for individuals who are not fully vaccinated (e.g., those who have received accommodations). The FAQs remind contractors that agencies may deny such employees entry to a federal workplace, consistent with the agency’s workplace safety protocols.

The new FAQs also address the question, “What steps should an agency take if a covered contractor does not comply with the requirements in the Task Force’s Guidance for Federal Contractors and Subcontractors?” The answer to this question states in part, “Where covered contractors are working in good faith and encounter challenges with compliance with COVID-19 workplace safety protocols, the agency contracting officer should collaborate with them to address these challenges. If a covered contractor is not taking steps to comply, significant actions, such as termination of the contract, should be taken.” The White House expanded on

this answer during a briefing later, stating that contracts should not be terminated if the contractor is making a good faith effort to backfill positions that became vacant because of the vaccination mandate.

The new FAQs also provide the following guidance:

- An unvaccinated covered contractor employee can begin work on a covered contract or at a covered contractor workplace while the contractor is continuing to review requests for accommodation. While accommodation requests are pending, the covered contractor must require a covered contractor employee with a pending accommodation request to follow workplace safety protocols for individuals who are not fully vaccinated (e.g., those who have received accommodations). Based on the Task Force's prior guidance, these protocols involve masking and physical distancing.
- Individual federal agencies will determine the workplace safety protocols that individuals who are not fully vaccinated must follow while in a federal workplace. In addition to masking, physical distancing, and testing protocols, the new FAQs allow agencies to impose heightened safety protocols when the agency determines such protocols are required. The new FAQs also allow agencies to determine that no safety protocol other than vaccination is adequate in some instances, and that covered contractor employees who are not fully vaccinated are unable to perform the work. The new FAQs emphasize that "[s]uch circumstances do not relieve the contractor from meeting all contractual requirements," raising the specter of termination for default if a contractor working on-site at a federal facility cannot provide enough vaccinated personnel to fulfill all contract requirements.
- Contractors "should generally" notify their contracting officers when one of their employees who works onsite at a federal workplace has received an accommodation to the requirement to be fully vaccinated.
- Employees of a corporate affiliate of a covered contractor are covered contractor employees if they perform work at a covered contractor workplace. Workplaces that are owned, leased, or otherwise controlled by a corporate affiliate of a covered contractor are covered contractor workplaces if any covered contractor employee is likely to be present at that workplace. This is so even if the corporate affiliate would not otherwise meet the definition of a covered contractor. The new FAQs adopt the definition of "affiliate" from FAR 2.101 and the SBA's rules.

In addition to the lawsuit filed by Florida, at least eleven states have filed complaints seeking to enjoin implementation of EO 14042 and the Task Force's guidance. On October 29, 2021, two separate lawsuits were filed – one by the State of Texas, in Texas federal court, and another filed by ten different states in Missouri federal court (states including Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota and Wyoming). The

lawsuits seek a litany of relief (including injunctions and declarations) against the enforcement of EO 14042, the Task Force guidance, the FAR Council guidance and issued deviation clause, and the OMB's conclusion that the Task Force's guidance should be enforced, arguing as applicable that the foregoing is unconstitutional, were issued without proper administrative procedure, and/or constitute an overstep of authority.