



# MCCC Business EXCEerator: Employer Liability for Vaccine Enforcement

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Sarah advises government contractors and commercial businesses on a wide variety of labor and employment issues, including the Fair Labor Standards Act, the National Labor Relations Act, Office of Federal Contract Compliance Programs regulations, and anti-discrimination law. Her practice also includes counseling employers on terminations, labor relations matters, employment agreements, wage and hour issues, and employment practices and policies. Sarah regularly advises clients on compliance specific to government contracting, including offering counsel on prevailing wage laws, such as the Service Contract Act, codes of ethics, and equal employment opportunity requirements.



# About PilieroMazza

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PilieroMazza—a business law firm—serves as a strategic partner to government contractors and commercial businesses from across the United States in numerous industries.

We deliver results for our clients by implementing legal and business solutions that take the client’s best interests into consideration. Moreover, PilieroMazza’s efficient operational structure and lean approach to staffing matters translate into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

- Audits & Investigations
- Bid Protests
- Business & Transactions
- Business Succession Planning
- Corporate and Organizational Governance
- Cybersecurity & Data Privacy
- Debt Financing
- Employee Incentive and Bonus Plans
- False Claims Act
- Fund Formation & Structuring
- Government Contracts
- Government Contract Claims & Appeals
- Intellectual Property & Technology Rights
- Labor & Employment
- Labor & Employment for Government Contractors
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Native American Law & Tribal Advocacy
- Nonprofits
- Private Equity & Venture Capital



# Overview

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- Biden Administration Actions
- Regulations Covering COVID Vaccination Policies
- Accommodating Exemptions to Mandatory Vaccination Policies
- Accommodations for ADA Disabilities
- Accommodations for Sincerely Held Religious Beliefs
- State Laws
- Other Employer Considerations



# Biden Administration Actions

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- July 29, 2021
  - Established the **Safer Federal Workforce Task Force**
  - Issued **Agency Model Safety Principles**
  - Fully vaccinated employees and onsite contractors:
    - must sign an attestation confirming vaccination status;
    - must wear a mask indoors if working in a locality with high or substantial transmission rates in accordance with the CDC guidance; and
    - not subject to any government-wide restrictions on official travel
  - Not fully vaccinated and / or unwilling to attest to their vaccination status:
    - must submit to weekly or bi-weekly COVID-19 tests;
    - must wear a mask and socially distance; and
    - subject to government-wide restrictions on official travel



# Biden Administration Actions

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- On Sept. 9, 2021, President Biden expanded on the previously issued mandate and announced sweeping updates to his national strategy to combat COVID-19
  - **Executive Order 14042** - requiring vaccinations for federal employees and federal contractors, ongoing safety protocols
  - **Employers with 100+ Employees Will Be Required to Ensure Vaccination or Weekly Testing** - OSHA will be issuing an emergency rule in the coming weeks
  - **Employers with 100+ Employees Must Provide Paid Leave for Employee Vaccination**
  - **Requiring Vaccinations for Healthcare Workers at Medicare and Medicaid Hospitals and in Healthcare Settings** - CMS will require vaccinations for workers in most healthcare settings that receive Medicare or Medicaid reimbursement, including but not limited to hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies



# FAR 52.223-99 Requirements

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- **Contracts Covered** – Services but encouraged to incorporate broadly (including products)
- **When**
  - As of 10/14/2021, agencies will be required to incorporate FAR 52.223-99 in new, renewed, and extended contracts
  - Initial deadline for compliance is 1/18/2021 for covered contracts (updated Nov. 10)
- **Who is Covered**
  - Working on contract (even remote workers)
  - In “Connection With” a contract (overhead)
  - Same facility as the above
- **Documentation**
  - Vaccine card or record from health care professional
  - Attestation forms not acceptable
- **Subcontractors**
- **Vendors**
- **Workplace Safety Coordinator**
  - Monitor community transmission rates to determine masking and social distancing



# FAR 52.223-99

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- Agencies implementing through FAR deviations
  - October 1, 2021, the [VA](#), [Homeland Security](#), and [NASA](#) issued their FAR deviations
  - October 4, 2021, [Department of Justice](#) issued its FAR deviation
  - October 5, 2021, [Department of Commerce](#) issued its FAR deviation
  - October 7, 2021, [Department of Treasury](#) and [HUD](#) issued their FAR deviation
  - October 8, 2012, [Department of Interior](#), issued its FAR deviation
  - GSA has begun MAS Mods
- All agencies have published their FAR deviations on [acquisition.gov](#). Generally, procuring Agencies seem to be adopting the FAR Council-recommended clause without changes. However, each procuring Agency has a different view as to when to apply the clause.





# Penalties

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- Not explicit, turn to normal recourse
  - “Where covered contractors are working in good faith and encounter challenges with compliance with COVID-19 workplace safety protocols, the agency contracting officer should work 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.”
  - “An agency may determine that a covered contractor employee who refuses to be vaccinated in accordance with a contractual requirement pursuant to EO 14042 will be denied entry to a Federal workplace, consistent with the agency’s workplace safety protocols.”
- Breach of Contract
- Implied Certification = False Claims Act
- Whistleblowers

# OSHA Emergency Temporary Standard

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- **Employers with 100+ employees must implement a mandatory COVID-19 vaccination policy or require unvaccinated employees to undergo weekly testing.**
  - \*\*\*Exception for worksites covered by EO 14042
  - Dec. 5 deadline (exception of testing which is Jan. 4)
  - Additional masking and reporting obligations
  - Only applies to employees who report to a workplace where others are present.
  - 4 hours of additional leave to get vaccinated
- **Nov. 6: 5<sup>th</sup> Circuit COA stay**
  - Nationwide immediate effect
  - All but 10<sup>th</sup> circuit have cases pending
  - Lottery to determine circuit to determine case

# Regulations Covering COVID Vaccination

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- Prior to the pandemic, it was not uncommon for employers to require their workforce to receive inoculations against certain viruses that posed a threat to public health
  - E.g., seasonal influenza
- Federal regulatory authority
  - Equal Employment Opportunity Commission (EEOC)
    - COVID-19 poses a “direct threat” to health in the workplace
    - Employers permitted to implement enhanced safety measures



# Regulations Covering COVID Vaccination

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- Occupational Safety and Health Administration (OSHA)
  - General Duty Clause: furnish employees with workplace free of workplace hazards, which may include encouraging vaccines



# Accommodating Exemptions to Mandatory Vaccination Policies

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- In general, employees who refuse to receive one of the available COVID vaccinations may not work on or in connection with a covered contract and may be subject to termination or leave
- **Exemptions: Medical (ADA), Religion (Title VII)**
- Be aware: Asking why an employee has chosen not to be vaccinated could elicit information about a disability or genetic information
- 60-day exemption from CO for urgent, mission-critical need



# Accommodations for ADA Disabilities

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- Disability - The person's own condition (allergic reaction probability)
  - Evaluate whether the condition is medical (vs. concerns about long term effects)
  - May ask for documentation
  - Will it cause an undue burden (i.e., significant difficulty or expense)
  - Case-by-case analysis
- Engage in an interactive process
  - Engage with individual
- Possible accommodations include providing personal protective equipment (PPE), altering work times or assignments, telework arrangements, testing
  - An employer need not necessarily grant an employee their requested accommodation



# Accommodations for Sincerely Held Religious Beliefs

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- Title VII requires employers to reasonably accommodate an employees sincerely held religious beliefs
  - Presume belief is sincere unless objective reason to question
  - Ask follow-up if questionable
  - Again, case-by-case analysis
  - Undue Burden (Standard is lower)
- Can be difficult to determine whether an employee’s religious beliefs are “sincerely held”
  - Not unusual for an employee to present a set of nontheistic beliefs
- What is a “sincerely held religious belief”?
  - Generally, sincerely held religious beliefs are “moral or ethical beliefs as to what is right and wrong” that are held by the employee with the same sincerity as that of traditional religions akin to that of God.
- Engage in an interactive process



# State Laws

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- Preemption and the supremacy clause
- May see litigation surrounding Biden's mandate
  - Montana: Prohibits employers from denying employment or discriminating against employees based on vaccination status
  - Florida: prohibits any business from requiring customers to provide documentation certifying COVID vaccination
  - Texas: requires accommodation where individual objects to vaccination for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19
  - Santa Clara, California: Employers are required to obtain a record of workforce's COVID vaccination status or face a \$5k per day fine





# Questions?

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