

October 27, 2021

The Honorable Joseph R. Biden
President of the United States
The White House
1600 Pennsylvania Ave NW
Washington, DC 20500

Dear President Biden,

We write to express our grave concerns about imposing the federal government's mandatory vaccination requirement on federal contractors across the government supply chain. Like other mandates being imposed by the federal government, this mandate stands on shaky legal ground, cannot be reconciled with other messaging provided by the government, and forces contractors unable to make sense of its many inconsistencies to require that their entire workforce be vaccinated on an unworkable timeline or face potential blacklisting by the federal government or loss of future federal contracts. We strongly urge you to instruct agencies to cease implementing the mandate or, at a minimum, to provide clarity to agencies and federal contractors across the country and delay the mandate's compliance date.

As an initial matter, agencies that implement the mandate may have their actions found unlawful and set aside as arbitrary and capricious.¹ Many aspects of the mandate, as set out in Executive Order 14042, "Ensuring Adequate COVID Safety Protocols for Federal Contractors," and the subsequent "Safer Federal Workforce Task Force Guidance for Federal Contractors and Subcontractors," are internally inconsistent and at odds with actions taken elsewhere by the government to combat COVID-19.

First, the ambiguous and inconsistent nature of the mandate itself raises questions about who it covers. Under the guidance issued by the Safer Federal Workforce Task Force ("Task Force"), a "covered contractor employee" required to be vaccinated is any full-time or part-time employee "working on or *in connection with* a covered contract; *or* working at a covered contractor workplace."² The guidance defines employees working "in connection with a covered contract" as employees "who perform duties necessary to the performance of the covered contract, but *who are not directly engaged in performing the specific work* called for by the covered contract."³ This language suggests that an employee with even a tangential connection

¹ See 5 U.S.C. § 706.

² COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, September 24, 2021, available at https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf (emphasis added).

³ *Id.* at Frequently Asked Questions No. 13 (emphasis added).

to a covered contract would fall under the scope of the mandate, even if that employee works in an office far from the contract work location.

Moreover, because a “covered contractor workplace” includes any location controlled by a covered contractor where a covered contract employee is likely to be present, entire contractor offices could be required to be vaccinated, even if only one employee has a tangential connection to a covered contract. At the same time, a “covered contractor workplace” does not include the residence of an individual working on a covered contract, which leads to the result that an employee working remotely who works “on or in connection with” a covered contract is required to be vaccinated, although a family member in the same household who works for the same contractor (but not on a covered contract) is not. These rules and their outcomes are nonsensical and confusing. Contractors who seek to comply with their obligations are left with little choice but to require that their entire workforce be vaccinated.

Second, the federal-contractor mandate is inconsistent with other COVID-19 related actions taken by the federal government. For example, on June 21, 2021, the Department of Labor issued an emergency temporary standard under the Occupational Safety and Health Act, setting forth workplace requirements for healthcare workers to “reduce transmission of COVID-19 in their workplaces.”⁴ While the Healthcare ETS itself is of questionable legality, it at least targets healthcare workers specifically because “the nature of their work often involving frequent and sustained close contact with COVID-19 patients.”⁵ And the Healthcare ETS mainly sought to prevent the spread of COVID-19 through on-site measures, such as patient and visitor screening and personal protective equipment (PPE) requirements.⁶ While the Healthcare ETS required employers to provide paid time off for employees to get vaccinated, it did not *require* employees to be vaccinated.⁷

Unlike the Healthcare ETS, the federal contractor mandate makes no attempt to account for industry-specific factors that might increase exposure risk. It applies across the board to all federal contractors, regardless of industry. And even in healthcare workplaces, where the risk of COVID-19 spread is arguably at its highest, the Healthcare ETS took more measured steps short of forced vaccination. Since the Healthcare ETS was issued in June, over 30 million more Americans have been fully vaccinated, suggesting that the need for vaccination is lower now than it was when the ETS was issued.⁸ For this reason, the Healthcare ETS is not only inconsistent with the federal-contractor vaccine mandate, but also with the forthcoming Centers for Medicare and Medicaid Services vaccine mandate applicable to healthcare workplaces receiving Medicare or Medicaid funding.

⁴ *Occupational Exposure to COVID-19; Emergency Temporary Standard*, 86 Federal Register 32376, June 21, 2021 (“Healthcare ETS”).

⁵ *Id.* at 32385.

⁶ *Id.* at 32430, 32431.

⁷ *Id.* at 32396.

⁸ *Trends in Number of COVID-19 Vaccinations in the US*, CDC.gov, available at https://covid.cdc.gov/covid-data-tracker/#vaccination-trends_vacctrends-fully-cum.

The federal-contractor vaccine mandate is also inconsistent with the forthcoming new Department of Labor emergency temporary standard, which seeks to have employers with over 100 employees ensure that their workforce is vaccinated.⁹ Unlike the federal-contractor mandate, the new emergency temporary standard allows for an alternative to forced vaccination, namely providing negative COVID-19 tests on a weekly basis.¹⁰ These differing and inconsistent approaches to competing mandates—both of which would cover federal contractors—suggest that the Administration itself recognizes the dubious legality of both mandates.

Third, President Biden’s remarks in announcing the federal-contractor vaccine mandate highlight why the mandate is unnecessary. The President emphasized that “the vaccines provide very strong protection from severe illness from COVID-19 . . . [and] the world’s leading scientists confirm that if you’re fully vaccinated, your risk of severe illness from COVID-19 is very low.”¹¹ But the federal-contractor vaccine mandate seeks to protect the vaccinated—for whom the risk of severe illness is “very low”—from those who choose to remain unvaccinated. Not only is this reasoning illogical, but it is likely to increase skepticism about the vaccine in those who have chosen not to receive it.

Setting aside the legality of the mandate, the failure of the Task Force to provide clear guidance has led to inconsistent application of the mandate by federal agencies. Guidance provided to contracting officers by the Civilian Agency Acquisition Council,¹² the Federal Acquisition Regulatory Council,¹³ and the Department of Defense¹⁴ about how to implement the mandate were generally consistent with each other, but simply adopted the ambiguous and inconsistent guidance issued by the Task Force and discussed above. Guidance provided by the General Services Administration (“GSA”) to contracting officers differed, however, by including “GSA-specific implementation timelines for solicitations, new contracts, and existing contracts.”¹⁵

⁹ *President Biden’s COVID-19 Plan*, September 9, 2021, available at <https://www.whitehouse.gov/covidplan/> (discussing proposed emergency temporary standard).

¹⁰ *Ibid.*

¹¹ Remarks by President Biden, Sep. 9, 2021, available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

¹² Memorandum for Civilian Agencies, September 30, 2021, available at https://www.acquisition.gov/sites/default/files/page_file_uploads/CAAC%20Letter%202021-03%20Ensuring%20Adequate%20COVID%20Safety%20Protocols%20for%20Federal%20Contractors%20%28EO%2014042%29%2009.30.2021.pdf

¹³ Memorandum for Chief Acquisition Officers, September 30, 2021, available at <https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf>.

¹⁴ Memorandum for Commander, U.S. Cyber Command, et al., September 30, 2021, available at <https://www.acq.osd.mil/dpap/policy/policyvault/USA001998-21-DPC.pdf>.

¹⁵ Memorandum for All GSA Contracting Activities, September 30, 2021, available at https://www.gsa.gov/cdnstatic/Class%20Deviation%20CD-2021-13_0.pdf.

Worse, the GSA’s guidance instructs officers to insist upon compliance with the mandate even for *existing* contracts, despite such an instruction falling entirely outside your Executive Order.¹⁶ If contractors do not agree to insert language requiring compliance into existing contracts, contracting officers are told that they “shall not exercise an option period or extend the period of performance for existing contracts.”¹⁷ GSA is even more heavy-handed when it comes to “indefinite delivery, indefinite quantity” (“IDIQ”) contracts. For these contracts, officers are encouraged to “take interim actions if a signed modification is not returned to GSA...such as...[t]emporarily hiding contractor information on GSA websites and/or e-tools [and] [f]lagging contractors that have not accepted the modification[.]”¹⁸ Essentially, GSA is instructing its officers to blacklist IDIQ contractors who will not agree to the mandate on their existing contracts.

Finally, implementing the mandate now, in the middle of a supply-chain crisis, could have disastrous consequences in light of the approaching holiday season.¹⁹ As the Cargo Airline Association recently informed you, it will be “virtually impossible to have 100% of [the] respective work forces vaccinated by December 8.”²⁰ The “virtual impossibility” of meeting this deadline is not unique to the cargo industry, and the inability of many contractors to guarantee compliance will have significant ramifications to the economy at large.

For these reasons, we strongly urge you to instruct the Task Force and federal agencies to halt any efforts to implement the federal contractor mandate. All citizens—including federal contractors—should have the right to make their own decision about whether to receive the COVID-19 vaccine. At the very least, you should provide additional guidance addressing the ambiguities and inconsistencies in the mandate, ensure that guidance is applied uniformly, and allow agencies and contractors additional time to comply.

Respectfully,



Lynn Fitch
Attorney General for Mississippi



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¹⁶ *Id.*

¹⁷ *Id.*

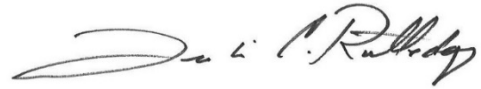
¹⁸ *Id.*

¹⁹ See Natasha Korecki, *Biden’s vaccine mandate has cargo giants in a pre-holiday panic*, POLITICO, Oct. 21, 2021, available at <https://www.politico.com/news/2021/10/21/joe-biden-vaccine-mandate-supply-chain-516682>.

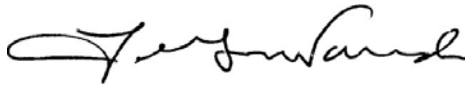
²⁰ Letter from Stephen A. Alterman, President, Airline Cargo Association, to Shalanda Young, Acting Director, Office of Management and Budget, Oct. 18, 2021.



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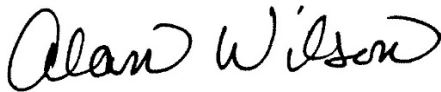
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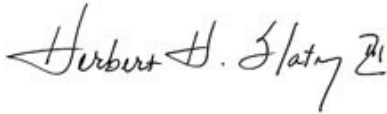
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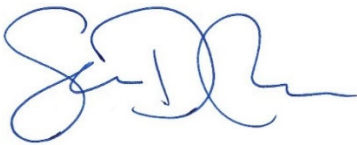
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CC: The Honorable Shalanda Young, Acting Director, Office of Management and Budget