

## REQUIREMENTS FOR FCUs TO MANDATE COVID-19 VACCINATIONS UNDER EXECUTIVE ORDER 14042

### SUMMARY:

On September 9, President Biden announced his COVID-19 Action Plan: Path Out of the Pandemic. The action plan includes, among other things, requirements for employees working for large (100-plus employees) private employers, working for the federal government, and working as federal contractors and subcontractors, to combat COVID-19.

The unanswered question for FCUs is whether “federal contractors” in Executive Order 14042 includes financial institutions with federal share and deposit insurance, which are considered government contractors within the meaning of the regulations implementing Executive Order 11246 (Affirmative Action Program). The implementing regulations for Executive Order 11246 have consistently defined a government contract as any agreement or agreement modification between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services. The term “nonpersonal services” explicitly includes agreements for insurance. Note, however, that this is a Department of Labor Office of Federal Contract Compliance Programs interpretation only and applies to compliance with Affirmative Action Program (AAP) obligations under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974.

Neither Executive Order 14042 nor the Task Force guidance clarify that financial institutions with federal share and deposit insurance are included in the term “federal contractors.” Therefore, until there is additional guidance such as regulations implementing Executive Order 14042 or guidance from NCUA, there is nothing to state that FCUs are federal contractors for purposes of Executive Order 14042. Credit unions should consult with legal counsel to determine if there are any state mandates that apply or if employers can mandate that employees get vaccinated as a condition of employment.

The mandate likely does apply to FCUs that are located on federal property, have a contract with a federal agency to provide products or services, or to offer services for federal employees or their dependents, since the Task Force guidance defines the term “contract” to include “all contracts and any subcontracts of any tier thereunder, ... including lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements... whether entered into verbally or in writing.” The term

contract shall be interpreted broadly. Such FCUs would have to look to their contract with the federal agency to determine if they are considered a “contractor” for whatever service or agreement is in place between the agency and the FCU. So, if a FCU has rent free space at a federal building, the contract for that space would likely define the relationship between the CU and the agency. The Task Force guidance says that federal contractor employees covered by the rules who are not entitled to exemption “must be fully vaccinated no later than December 8” and adds that after that date for future contracts employees must be vaccinated by the first day of performance on a new or extended contract

Regarding the OSHA ETS for employers with 100-plus employees, the Department of Labor will issue an Emergency Temporary Standard requiring employers with more than 100 workers to have them inoculated or tested weekly. This policy is expected to cover more than 80 million workers. We will have to wait for the OSHA standards to see precisely what is going to be required of larger employers beyond the state mandates. Secretary Gina Raimondo said last week that rule would be released in October.

#### DISCUSSION:

On September 24 the Safer Federal Workforce Task Force (Task Force) issued its expected “COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors.” The President created the task force to give the heads of federal agencies ongoing guidance to keep their employees safe and their agencies operating during the COVID-19 pandemic. The guidance was published in accordance with the requirements of President Biden’s six-part “Path Out of the Pandemic” COVID-19 action plan which includes two separate executive orders: Executive Order 14043 titled “Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees” and Executive Order 14042 titled “Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors.”

The action plan also directs the Department of Labor’s Occupational Safety and Health Administration (OSHA) to develop and implement a new Emergency Temporary Standard (ETS) to require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. The ETS will also require covered employers to provide employees paid time off to get vaccinated and recover from side effects associated with the COVID-19 vaccine. This requirement will impact over 80 million workers in private sector businesses with 100-plus employees.

Executive Order 14043 mandating vaccinations for federal employees is expected to cover more than 4 million Americans, including over 2 million in the federal civilian workforce, throughout the United States and around the world. Previously, vaccinations had only been mandated within the Department of Defense, Department of Veterans Affairs, the Indian Health Service, and the National Institutes of Health. Note that under this Executive Order, federal employees may no longer “test out” of vaccination. While disability or religious exemptions may be approved on a restricted basis, workers who do not qualify for such exemptions must become fully vaccinated.

The Task Force guidance implements the requirements of Executive Order 14042 to “ensure that parties who contract with the Federal Government provide COVID-19 safeguards in workplaces with individuals working on or in connection with a Federal Government contract or contract-like instrument. These workplace safety protocols will apply to all covered contractor employees, including contractor or subcontractor employees in covered contractor workplaces who are not working on a Federal Government contract or contract-like instrument.” This will be accomplished in part by requiring executive agencies to include a clause in certain federal contracts and contract-like instruments requiring contractors and subcontractors to comply with COVID-19 safety protocols promulgated by the Task Force. So, this means it will be by contract, and not by direct regulation, that federal contractors and subcontractors will be required to comply with new Task Force COVID-19 protocols.

The Task Force guidance covers not only employees working directly on federal contracts, but also employees who perform work “in connection with” a covered contract, (e.g., those such as human resources, billing, and legal personnel), and to all other employees working in the same location as such employees. Certain employees who work remotely are also covered. In addition, covered contractors must implement safety protocols related to masks and social distancing in their workplaces.

Pursuant to the Task Force guidance, federal contractors and subcontractors with a covered contract will be required to conform to the following workplace safety protocols:

- COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
- Compliance by individuals, including covered contractor employees and visitors, with the guidance related to masking and physical distancing while in covered contractor workplaces; and

- Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

The Task Force guidance defines a contract and contract-like instrument as having the meaning set forth in the Department of Labor's proposed rule, "Increasing the Minimum Wage for Federal Contractors," 86 Fed. Reg. 38,816, 38,887 (July 22, 2021). That proposed rule defines a contract or contract-like instrument as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law and includes all contracts for lease agreements, whether entered verbally or in writing. Therefore, FCUs on federal property should look to their contract with the federal agency to determine how they are characterized and what are their obligations under the contract to establish whether they are required to comply with the vaccine mandate.

*\*The information provided in this overview should not be construed as legal services, legal advice, or in any way establishing an attorney-client relationship. Credit unions should contact their own legal counsel for advice. Information may have changed since this information was prepared. This information is intended to only be a summary and is not all inclusive.*