

October 21, 2021

VACCINE MANDATE & DOT CONTRACTORS

As the December 8, 2021 deadline approaches for federal contractors to effect a workforce vaccine mandate. Many companies are asking whether they are, in fact, federal contractors subject to **President Biden's Executive Order**. This is important because a vaccine mandate for DOT contractors will be difficult for a lot of employers to implement.

We at Johnston, Allison & Hord, P.A. have heard a lot of confusion around whether contractors on federally-funded State DOT projects are subject to the Executive Order. The short answer: YES.

The Executive Order mandates full vaccination for contracts and "Contract-Like Instruments" with the federal government if they fall into one of four categories. The inquiry is two-fold:

1. Is a contract to work on a federally-funded State DOT project considered a "Contract" affected by the Executive Order?
2. If so, does a federally-funded State DOT project fall into one of the four Covered Categories?

Is it a "Contract"?

As to the first question, the **Guidance** released on September 24, 2021, clarifies that even though a company's contract may be with a State government entity, this is a federal contract. Specifically, the Guidance states that "Contract" or "Contract-Like Instrument" means "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law," and includes contracts covered by the Davis-Bacon Act.*

The Davis-Bacon Act sets forth wage requirements for workers of contractors and subcontractors on federally-funded projects, including federally-funded State DOT projects. Generally, on such projects, there is an agreement between the federal government and the state entity. See **23 CFR § 630.108** (2021).

So it is fair to assume that a federally-funded State DOT project qualifies as a "Contract" under the Executive Order.

Does it Fall Under a Covered Category?

That does not end the inquiry, though. The "Contract" must also fall into one of the four Covered Categories set forth in the Executive Order. Those are:

1. a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property
2. a contract or contract-like instrument for services covered by the Service Contract Act, 41 U.S.C. 6701 *et seq.*
3. a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b); or
4. a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public

Based on current guidance and referenced authorities, a federally-funded State DOT project falls under Category 1 and, possibly Category 4.

Covered Category 1 pertains to procurement contracts for construction. It does not state that this must be a *federal* procurement contract. In other executive orders, the use of this terminology has been interpreted to include and refer to any contract covered by the Davis-Bacon Act. See **Proposed Rule** (clarifying meaning of “procurement contracts for construction”). Again, this would indicate that federally-funded State DOT projects fall under this item.

Even so, Covered Category 4 includes a contract with the federal government in connection with federal property related to offering services to the general public.

- Federally-funded State DOT projects have a contract with the federal government: the project agreement required under 23 CFR § 630.108.
- These projects are “in connection with federal property” because they are undertaken with federal funds.
- These projects are “related to offering services for the general public,” because the construction or improvement of highways is for the benefit of all.

Do Exclusions Apply?

It does not appear so. The Executive Order expressly excludes grants, but this does not remove Davis-Bacon Act contract/federally-funded State DOT projects from its application.

How JAH Can Help

Our attorneys are staying up to date with the vaccine mandate and how it relates to DOT contractors. Contact a member of our **Employment Practice Group** for assistance in determining to what extent

your business is required to comply with the vaccine mandate, or for assistance in implementing a compliant protocol.

Reminder: Contractors subject to the mandate still need to be prepared to address individual requests for medical or religious exemptions from the vaccine. Keep an eye out for information on how to plan and implement a process for considering and accommodating such requests.

*This definition is incorporated from a **Proposed Rule** implementing regulations pursuant to a separate executive order. Both the Guidance and the Proposed Rule state that the term “contract” should be interpreted broadly.

Please note that the above JAH article does not constitute legal advice nor does it create an attorney-client relationship. Should you be in need of legal services regarding a particular matter, please reach out directly to one of our attorneys. Click [here](#) for our full website disclaimer.