



VIA ELECTRONIC SUBMISSION

September 23, 2021

Mathew C. Blum
Acting Administrator
Office of Federal Procurement Policy
Office of Management and Budget
Washington, DC 20503

RE: Construction Industry Concerns Regarding Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors

Dear Members of the Safer Federal Workforce Task Force and FAR Council:

Associated Builders and Contractors submits the following feedback on behalf of its construction industry federal contractors in response to Executive Order 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors*,¹ which directs the Safer Federal Workforce Task Force to develop guidance and the Federal Acquisition Regulatory Council to write regulations to implement this guidance in future federal contracts.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for private and government customers. Moreover, the vast majority of ABC's contractor members are classified as small businesses. This is consistent with the Census Bureau and U.S. Small Business Administration's Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)² and industry workforce employment (more than 82% of the construction industry is employed by small businesses).³ In fact, construction companies that employ fewer than 100 construction

¹ Issued Sept. 9, 2021: <https://www.federalregister.gov/documents/2021/09/14/2021-19924/ensuring-adequate-covid-safety-protocols-for-federal-contractors>

² U.S. Census Bureau 2019 County Business Patterns: <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.

³2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Page 3, <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf>.

professionals compose 99% of construction firms in the United States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.⁴

In addition to small businesses that build private and public works projects, ABC also has large member companies that contract directly with federal, state and local governments to successfully build projects subject to government acquisition regulations and subcontract work to qualified small businesses that meet federal, state and local government small business contracting goals.

ABC member general contractors compose a crucial segment of the construction industry's federal contracting base⁵ as ABC members won 57% of the \$118 billion in direct federal U.S. construction contracts exceeding \$25 million awarded during fiscal years 2009-2020.⁶

Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

The COVID-19 pandemic has created and accelerated a host of challenges currently facing the construction industry, which includes a skilled workforce shortage, rising material costs, supply chain disruptions, jobsite shutdowns, additional health and safety protocols and new government regulations.

From the beginning of the pandemic, ABC has created resources and toolkits for its construction industry member employers and employees to help reduce the risk of exposure to COVID-19.⁷ Because ensuring healthy and safe work environments is a top priority of ABC and its members, ABC encourages its members and other construction industry stakeholders to get vaccinated. A number of ABC chapters and member companies have organized and promoted educational campaigns and vaccination drives to accelerate the voluntary vaccination of industry stakeholders and employees.

ABC shares the following feedback on EO 14042 so the Task Force and FAR Council can craft sensible regulations enhancing the safety of federal jobsites while proactively addressing practical questions and concerns that have been raised by the federal contracting community since the EO's release earlier this month.

A failure to craft sensible and measured guidance, will create serious compliance burdens, confusion, legal liability, workforce shortages and increased costs for federal contractors that

⁴ U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019, Available at <https://thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx>.

⁵ According to the U.S. Census Bureau (accessed Sept. 15, 2021), there was roughly \$30 billion in federal construction put in place in 2020 https://www.census.gov/construction/c30/historical_data.html

⁶ USASpending.gov data (accessed Dec. 22, 2020) cross-referenced with ABC membership. This data does not account for ABC members who performed subcontracting work on federal construction jobsites as that subcontractor information is not available on USASpending.gov or other government resources.

⁷ ABC's COVID-19 related resources and toolkits can be accessed at <https://www.abc.org/coronavirus> and <https://www.abc.org/Coronavirus/Vaccine-Toolkit>

will ultimately undermine the economy and efficiency in federal contracting and invite further disruptive legal challenges from public, private and employer stakeholders.

1. A Vaccine Mandate for Federal Contractor Employees Is Likely to Exacerbate the Construction Industry's Skilled Labor Shortage, Undermine the Economy and Efficiency in Federal Contracting

ABC urges the Task Force to consider the negative and disruptive impacts that a federal contractor employee vaccination requirement will have on labor availability for the construction industry as this could undermine economy and efficiency in federal contracting of construction services.⁸

Currently, the U.S. construction industry needs to hire and upskill an estimated 430,000 construction workers in 2021 to meet current industry demand, which does not include additional short- and long-term investment in infrastructure resulting from legislation currently considered by Congress and the Biden administration.⁹ In response, ABC and its contractor members are working tirelessly to recruit, educate and upskill our nation's future construction workforce by investing in workforce development initiatives to equip craft professionals with durable and transferable skill sets.¹⁰

However, a vaccine mandate for federal contractors will exacerbate the construction industry's skilled workforce shortage,¹¹ as construction workers opposed to mandatory vaccines are likely to leave their current federal contractor employer and seek employment with other construction businesses (or move to other industry employers) without such requirements. Because construction industry businesses are in desperate need of labor, there is ample opportunity for construction workers opposed to vaccine mandates to find employment with firms that are not subject to the federal contractor rule and the forthcoming U.S. Department of Labor's Occupational Safety and Health Administration's Emergency Temporary Standard applying to all employers with 100 or more employees.

Should it withstand legal challenge, a vaccine mandate for federal contractor employees is likely to further exacerbate the labor shortage and undermine federal contractors' ability to meet contractual obligations to build projects that are critical to national security and other federal government objectives.

⁸ The Cybersecurity and Infrastructure Security Agency generally considers the construction industry an essential industry. See CISA Guidance on Essential Critical Infrastructure Workforce (accessed Sept. 21, 2021)

<https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>

⁹ [The Construction Industry Needs to Hire an Additional 430,000 Craft Professionals in 2021](#), March 23, 2021, ABC News Release.

¹⁰ [Survey: ABC Members Invested \\$1.3 Billion in Construction Workforce Education in 2020](#), May 24, 2021, ABC News Release.

¹¹ The U.S. Bureau of Labor Statistics August unemployment rate for the construction industry is 4.6% (accessed Sept. 21, 2021) <https://www.bls.gov/iag/tgs/iag23.htm>.

2. A Vaccine Mandate for Federal Contractor Employees Is Likely to Discourage Competition from Federal Contractors and Undermine Economy and Efficiency in Federal Contracting

Because of additional compliance burdens, new contractual and legal risks and other issues raised by a vaccine requirement for federal contractor employees, there is a strong likelihood fewer federal construction companies will pursue federal contracting opportunities. Instead, they will choose to pursue private and government contracts not subject to vaccine mandates.

An August 2021 ABC survey of federal contractor members found that 49% of survey participants would be less likely to bid on federal contracts subjected to vaccine requirements for onsite employees, while 47% said it would make no difference in their pursuit of federal contracts.

While it is not possible to determine if this sentiment is held across the construction industry's entire federal contracting community given the compressed timeline to provide feedback, a 50% reduction of federal contractors competing for federal construction contracts is likely to have a significant impact on costs to the federal government. Increased construction costs may hinder the ability of federal agencies to meet their construction-related needs to support critical government objectives.

3. A Vaccine Mandate for Federal Contractor Employees Is Likely to Increase Costs and Undermine Economy and Efficiency in Federal Contracting

Skilled labor shortages, additional regulatory burdens and new risk and liability exposure are key sources of likely cost increases impacting federal contractors that will ultimately result in increased construction costs to the federal government on future contracts.

An August 2021 ABC survey of federal contractor members found that 77% of survey participants said vaccine requirements will increase costs on federal construction projects while 22% said it will make no difference. Just 1.2% of respondents said vaccine mandates will decrease costs.

4. The Task Force and FAR Council Can Mitigate Some Increased Costs, Reduced Competition, Delays and Risk with Clear Guidance and Regulatory Certainty

For the reasons stated above, the Task Force and FAR Council should prepare for considerable delays, cost escalations and disruptions to the federal contracting process and federal agency strategic objectives as a result of a federal contractor vaccine mandate.

Because the Task Force guidance and FAR regulations have not been issued, it is not possible to offer additional data estimating the impact of a vaccine mandate on federal contractors specific to cost and reduced competition.

However, we submit 25 frequently asked questions by ABC federal contractors that should be addressed in the guidance and/or rulemaking. Addressing these questions proactively and

clearly may eliminate some of the rules' negative impact on the economy and efficiency in federal contracting.

Frequently Asked Questions

1. Does the policy apply to all employees of a federal contractor or just federal contractor employees performing construction work on a specific covered federal jobsite?
2. Is there any consideration given to exemptions for certain types of federal construction projects and/or construction activities that are considered "low exposure risk" by OSHA?
3. What is the definition of a federal contractor employer and employee?
4. Will a vaccination mandate be satisfied after one, two or three vaccination doses?
5. Is there any consideration given to exemptions for employees with a recent confirmed COVID-19 infection?
6. What is an acceptable system for employers to use to verify employee vaccine status (and testing results, if applicable)?
7. Does the policy direct general contractors to certify compliance by subcontractors and independent contractors? If so, are general contractors responsible for employees performing work on the covered jobsite only or is the scope expanded to all subcontractor workers on other unrelated construction jobsites and offices?
8. Have any considerations been made with respect to sharing health information amongst different employers with respect to existing health privacy laws and regulations?
9. Can a government agency be in charge of compliance vs. offloading that burden, cost, the legal liabilities and risk on to general contractors?
10. Do federal agency contracting officers have the proper resources and training to evaluate policy compliance by federal contractors?
11. Will the taskforce issue new guidance and will the FAR Council issue new regulations if the Centers for Disease Control and Prevention and other health officials change vaccine and testing recommendations as a result of new information or a new COVID-19 variant?
12. Will the guidance require federal contractors to provide paid time off for the time it takes workers to get vaccinated or to recover from post-vaccination side effects?
13. Will there be vaccine requirement exemptions for employees due to religious and health purposes?
 - a. If so, what are acceptable exemptions and what is the process for religious/medical exemption approval?
14. Will there be a testing requirement for employees receiving religious/medical exemptions?
 - a. If so, which are the acceptable tests and how frequently must testing occur?
 - b. If so, do employers need to pay for time off spent testing?
 - c. If so, will employers be expected to pay for tests for employees?
 - d. If so, will employers be expected to provide tests on a jobsite?
 - e. What happens if there is a shortage of tests in a market and/or testing isn't possible or practical in a remote geographic location or on a jobsite?
 - f. Can federal contractors ask for and receive test results from employees?
 - g. What is the federal government doing to ensure federal contractors have access to a reliable supply of affordable tests?

15. If an employee refuses vaccinations or testing, is the employer allowed or required to fire the employee, or must they make reasonable accommodations?
16. If an employer has 100 or more employees and is also a federal contractor, will it be expected to comply with both the OSHA ETS and federal contractor rules, and what happens if the rules are not consistent?
17. When does the vaccination policy affecting federal contractors take effect and will federal contractors be given a realistic amount of time to comply with the FAR Council regulations?
18. Will the FAR Council develop a policy to accept change orders on active contracts as a result of changes to vaccine and testing requirements and recommendations?
19. What is the penalty for noncompliance?
20. What if the guidance and policy interferes with existing collective bargaining agreements with unions?
21. Will there be a sunset date for this policy?
22. Will there be an evaluation of this policy on a regular basis?
23. Has the Task Force given any unique consideration to the impact this guidance will have on federal contractors in the construction industry and the economy and efficiency in federal contracting?
24. Has the Task Force given special consideration to the impact this guidance will have on Historically Underutilized Business Zone small businesses, women-owned small businesses and other groups subject to federal agency contracting goals?
25. Has the Task Force evaluated the impact of incentives on employees and employers with respect to voluntary vaccination and testing?

Conclusion

Thank you for considering ABC's feedback in advance of the Task Force guidance. We would welcome the opportunity to discuss our concerns in greater detail in person or in a virtual setting. We look forward to providing you with additional feedback and data following the issuance of the guidance as we work together to help the construction industry's federal contractors understand this new rule.

Respectfully submitted,



Ben Brubeck
Vice President of Regulatory, Labor and State Affairs
Associated Builders and Contractors