



Weekly Update | September 17, 2021

## COVID-19 Update

### Mandate

**Federal Contractor Mandate.** More information is expected September 24, concerning the federal contractor mandate (vaccine mandate, no testing option). At this point in time, the mandate deserves the back burner—it will not apply to existing contracts, although it is uncertain whether it may be brought into contract change provisions. It is expected to apply to federally funded projects, such as MnDOT contracts, and require upstream contractors to require its downstream subcontractors to certify compliance. Penalties for noncompliance are not known but may include debarment. In sum, we will need to wait until September 24, for more information and expect that it will not apply to work immediately.

**OSHA Mandate.** The OSHA mandate (vaccinated or weekly testing) is safety oriented and applies to companies with 100 or more employees. Some indication suggests that the 100- employee threshold may be counted by payroll. This is the more difficult mandate because it applies broadly, will take place sooner, and includes penalties of up to \$14k per employee. This also is the mandate that will be challenged as an arbitrary and capricious standard and may never take effect.

**Minnesota Mandates.** The Minnesota State mandate (Rule 1446) applies to contractors who work indoors near State employees. The State adjusted its mandate in light of [AGC's letter](#). The details can be found [here](#). County and cities also are imposing mandates that may apply to contractors.

**Owner mandates.** Some individual owners also are imposing mandates on their construction sites that may or may not mirror the federal, state or local mandates. AGC's letter to the State may provide a good basis to explain to the difficulties and potential costs of a mandate, and support for change orders.

### Impact and Response.

**Employee Compliance.** Early surveys suggest that (+/-) 35% of employees may refuse getting vaccinated or tested, raising the specter of unimaginable delays, costs, sequencing, supply deliveries and security, and contract questions.

**Change Orders.** Mandates imposed by owners should be subject to change orders to cover impacts of the owner mandate. It is less clear whether impacts due to a federal mandate will justify a change order.

**AGC Advocacy.** AGC of Minnesota successfully advocated to the Governor and State leaders the difficulties of a mandate and the lessened need to apply it specifically to construction where familiarity with safety protocols is high and a proven track record of performance exists. AGC of America similarly has advocated to federal administrators for voluntary vaccines and specific construction exemptions. OSHA is not taking formal feedback on the emergency rule.

**Help and Recommendations.** AGC of America has a [toolkit](#) to help contractors navigate the COVID mandate quagmire. AGC of Minnesota has posted a number of useful documents and tools on our [COVID webpage](#), and is preparing more resources to help comply with vaccine/testing mandates. Here are some early thoughts:

**Encouraging Employees to Receive Vaccine.** A contractor will have fewer worries and be better positioned in the market if it can show that it has an available vaccinated workforce. It is a smart business practice that may better position your firm for later compliance efforts to encourage employees to be vaccinated. Direct financial incentives have helped while more market-based approaches like health plan surcharges for unvaccinated employees have been pursued to increase vaccination rates.

**Information.** Providing information to resistant employees also has been helpful, including correcting misinformation. For instance, the vaccine does not prevent COVID infection but makes it less likely that COVID will become a serious illness; the Pfizer vaccine has full FDA approval; etc. Also, personal stories have been helpful in focusing the real impact that infection and illness have had. Finally, provide information on where to get vaccinated ([here](#) or [here](#)).

**Compiling Data.** Much is still unknown about managing compliance. The recommendation now is to compile the employee's name, date of vaccine, and vaccine manufacturer, and keep the information secure. Internally track the percentage vaccinated and sending vaccinated workers to sites with a mandate. Upstream contractors can ask downstream contractors to confirm that the downstream contractor has a system and is complying with a mandate, but, absent a good reason and formal request, it is unlikely that the upstream contractor can compel disclosure (or would want to).

**Docket App.** The Minnesota Department of Health has just launched a phone app that will display an employee's vaccination status. This technology may make verification easier for employer and employee.

**Share information.** Finally, consider sending us your data—percentage vaccinated, concerns raised, successes. Your information will remain confidential, non-identifiable, and will help us establish best practices.

**AGC Seminar.** AGC is hosting a [seminar on October 22](#). By this time, the federal rules will have been issued and the path forward will be clearer allowing more definitive answers and guidance.