

**COVID-19 Update**  
**Managing Supply Chain Interruptions and  
Vaccination/Testing Requirements**

Michael Klein – [mklein@mcneeslaw.com](mailto:mklein@mcneeslaw.com)

David Levine – [dlevine@mcneeslaw.com](mailto:dlevine@mcneeslaw.com)

Andrew Levy – [alevy@mcneeslaw.com](mailto:alevy@mcneeslaw.com)



# COVID-19 Legal Landscape

And the Vaccine Mandates That May Never Be

Andrew Levy

[alevy@mcneeslaw.com](mailto:alevy@mcneeslaw.com)

717.237.5252



## President Biden's September 9, 2021 announcement:

- Requiring vaccinations for federal executive branch workers.
- Requiring vaccinations for employees of **certain federal government contractors** and subcontractors.
- Directing CMS to require vaccinations for workers in most healthcare settings that receive Medicare or Medicaid reimbursement.
- **Directing OSHA to issue an emergency temporary standard (ETS) requiring all employers with 100+ employees to ensure their workers are vaccinated or tested weekly.**



# The Occupational Safety and Health Administration Emergency Temporary Standard (ETS)

- **Published November 5, 2021**
  - Compliance dates – December 6, 2021 and January 4, 2022
- **Establishes minimum requirements for employers related to COVID-19 regarding:**
  - Vaccination
  - Vaccination verification
  - Masking and testing for unvaccinated employees
  - Recordkeeping and reporting



# Employees exempted from the ETS requirements



- Employees who do not report to a workplace where others are present
- Employees covered by EO 14042 or the CMA mandate
- Employees who work “exclusively” outdoors
  - Outdoors – well ventilated, open spaces, solitary or not crowded
  - Outdoor workspaces are not:
    - Partially completed construction (with walls and ceiling)
    - Work vehicles with other employees
    - Construction trailers
  - Extremely brief (de minimis) periods indoors will not render the exception inapplicable



# Proof of Vaccination

- Beginning November 5, 2021, employers must maintain a vaccination roster and retain a copy of:
  - The employee's vaccine card or other immunization record
  - Employee Signed Attestation
- Employers who have ascertained vaccination status prior to November 5, 2021, are permitted to rely upon the process previously used, even if they did not receive a copy of vaccine documentation

**COVID-19 Vaccination Record Card**  
Please keep this record card, which includes medical information about the vaccines you have received.

Last Name \_\_\_\_\_ First Name \_\_\_\_\_ MI \_\_\_\_\_  
Date of birth \_\_\_\_\_ Patient number \_\_\_\_\_

Vaccine	Product Name/Manufacturer	Lot Number	Date	Healthcare Professional or Clinic Site
1 <sup>st</sup> Dose COVID-19			mm dd yy	
2 <sup>nd</sup> Dose COVID-19			mm dd yy	
3 <sup>rd</sup> Dose COVID-19			mm dd yy	
4 <sup>th</sup> Dose COVID-19			mm dd yy	





# Judicial Review of the ETS

- **OSH Act provides US Courts of Appeals jurisdiction to hear challenges to OSHA Rulemaking**
- **Multiple lawsuits filed across the country challenging ETS.**
- **November 6, 2021 - Fifth Circuit issues a temporary stay.**
  - November 15, 2021, opinion explains reasons for the Stay and Court's ruling that ETS was not a valid exercise of OSHA's authority
- **November 16, 2021 - the Federal Judicial Panel on Multi-District Litigation select the Sixth Circuit to decide all consolidated cases challenging the ETS**
  - Sixth Circuit will soon decide OSHA's Motion to lift the temporary stay



# Executive Order on COVID-19 Safety protocols for federal contractors – EO 14042

- **Extends vaccine mandate for federal executive branch employees to include certain federal government contractor employees.**
  - Applies to construction contracts where federal government is the owner.
  - Applies to contract options or modifications after **October 15, 2021**, and new contracts (or contract-like instruments) entered after **November 12, 2021**.
  - Requires all covered employees to be fully vaccinated by **January 18, 2021**, “except in limited circumstances where an employee is legally entitled to an accommodation.”
  - Safer Federal Workforce Task Force guidance issued **September 24, 2021**, **and most recently updated November 10, 2021**.
    - [For Federal Contractors | Safer Federal Workforce](#)





# Executive Order on COVID Safety protocols for federal contractors – EO 14042

## ■ Safer Federal Workforce Task Force Guidance

- Covers all employees working “in connection with” a covered contract and all other employees at the same workplaces.
- Covered contractors must review proof of vaccination.
  - **Covered employees must “show or provide” vaccine card or other proof**
- Covered contractors must comply with published CDC Guidance for masking and physical distancing at a covered workplaces:
  - **Unvaccinated employees must wear masks indoors.**
  - **Fully vaccinated employees must wear masks indoors in areas of high or substantial community transmission:**
    - <https://covid.cdc.gov/covid-data-tracker/#county-view>



# Executive Order on COVID Safety protocols for federal contractors – EO 14042

## ■ Safer Federal Workforce Task Force Guidance – Subcontractor Compliance

- Q: What is the prime contractor's responsibility for verifying that subcontractors are adhering to the mandate?

A: The prime contractor is responsible for ensuring that the required clause is incorporated into its first-tier subcontracts in accordance with the implementation schedule set forth in section 6 of Executive Order 14042. When the clause is incorporated into a subcontract, a subcontractor is required to comply with the Task Force Guidance for Federal Contractors and Subcontractors and the workplace safety protocols detailed herein. Additionally, first-tier subcontractors are expected to flow the clause down to their lower-tier subcontractors in similar fashion . . .

- Q: May the prime contractor assume the subcontractor is complying with the clause?

A: Yes, unless the prime contractor has credible evidence otherwise.



# Judicial Review of EO 14042

- **Numerous lawsuits filed in US District Courts across the country**
  - November 30, 2021 - District Court in Kentucky issued a preliminary injunction blocking EO 14042 from taking effect in Kentucky, Tennessee and Ohio. *Commonwealth of Kentucky, et al. v. Biden*, No. 3:21-cv-00055 (E.D. Ky. Nov. 30, 2021).
  - December 7, 2021 - District Court in Georgia issued a preliminary injunction blocking EO 14042 nationwide. *State of Georgia v. Biden*, No. 1:21-cv-163 (S.D. Ga. Dec. 7, 2021)
  - OMB Guidance – “The Government will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice”



# Judicial Review of EO 14042

- The Biden administration has appealed both decisions staying the Executive Order (*State of Kentucky* to 6<sup>th</sup> Cir., *State of Georgia* to 11<sup>th</sup> Cir.)
  - *State of Kentucky* – Stay Denied
  - *State of Georgia* – Motion for Stay pending
- The appeals will proceed through briefing and argument
- Biden administration says it will “vigorously defend”



# Centers for Medicare and Medicaid Services' (CMS) Interim Final Rule

- **Revises the requirements Medicare and Medicaid certified providers and suppliers must follow to participate in the Medicare and Medicaid Programs**
  - CMS issued as emergency rulemaking in order to skip the notice and comment procedures required by the Administrative Procedures Act and have the rule go into effect immediately
- **Requires the staff of most Medicare and Medicaid healthcare providers to be fully vaccinated by January 18, 2022**
- **Must track and document the vaccination status of each staff member**



# Centers for Medicare and Medicaid Services' (CMS) interim final rule

- **Applies to all staff working for providers regulated under CMS health and safety regulations**
  - Hinges on frequency of entry into facility and contact with staff and patients
  - Does not apply to employees who work 100% remotely, personal visitors, one off vendors providing ad-hoc non-health care services, or others who may infrequently enter a facility
  - Does apply to administrative staff, housekeeping, food services, and contractors that visit a CMS regulated facility on a regular basis (at least once per week)
    - **Construction contractor employees working at a hospital, using common areas or shared facilities (restrooms, cafeteria, etc.) would be subject to rule**





# Judicial Review of CMS Interim Final Rule

- **Several lawsuits filed in federal district courts to challenge the rule**
  - November 29, 2021 – District Court in Missouri issued an injunction blocking implementation and enforcement of the CMS final rule in ten states. *State of Missouri, et al., v. Biden*, No. 4:21-cv-01329 (E.D. Mo., November 29, 2021).
  - November 30, 2021 – District Court in Louisiana issued an injunction blocking the CMS final rule's enforcement and implementation nationwide. *State of Louisiana, et al., v. Becerra*, No. 3:21-cv-03970 (W.D. La., November 30, 2021).



# Judicial Review of CMS Interim Final Rule

- Government appealed the Missouri case to the 8<sup>th</sup> Circuit and the Louisiana nationwide injunction to the 5<sup>th</sup> Circuit
  - Stays of the injunctions were denied
- CMS suspended all activities related to implementation and enforcement pending future developments in the pending litigation



## What Now?

- **Watch status of judicial review of vaccine mandates**
- **Will local mandates expand (NYC)?**
- **Comply with any owner-imposed vaccine requirements and safety measures**
  - Private mandates have been upheld
  - Should provide process to consider accommodations for religion/disability
- **Maintain appropriate protocols for your business and workforce**



# What Now?

- **Maintain appropriate protocols for your business and workforce**
  - Symptom reporting, isolation and quarantine
  - Face covering requirements
  - Encourage vaccination and boosters
  - Surveillance testing?
  - Work-relatedness Assessment and OSHA Recordkeeping/Reporting
- **Consider OSHA Guidance:** [Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace | Occupational Safety and Health Administration \(osha.gov\)](#)
- **Consider union bargaining issues, if applicable**

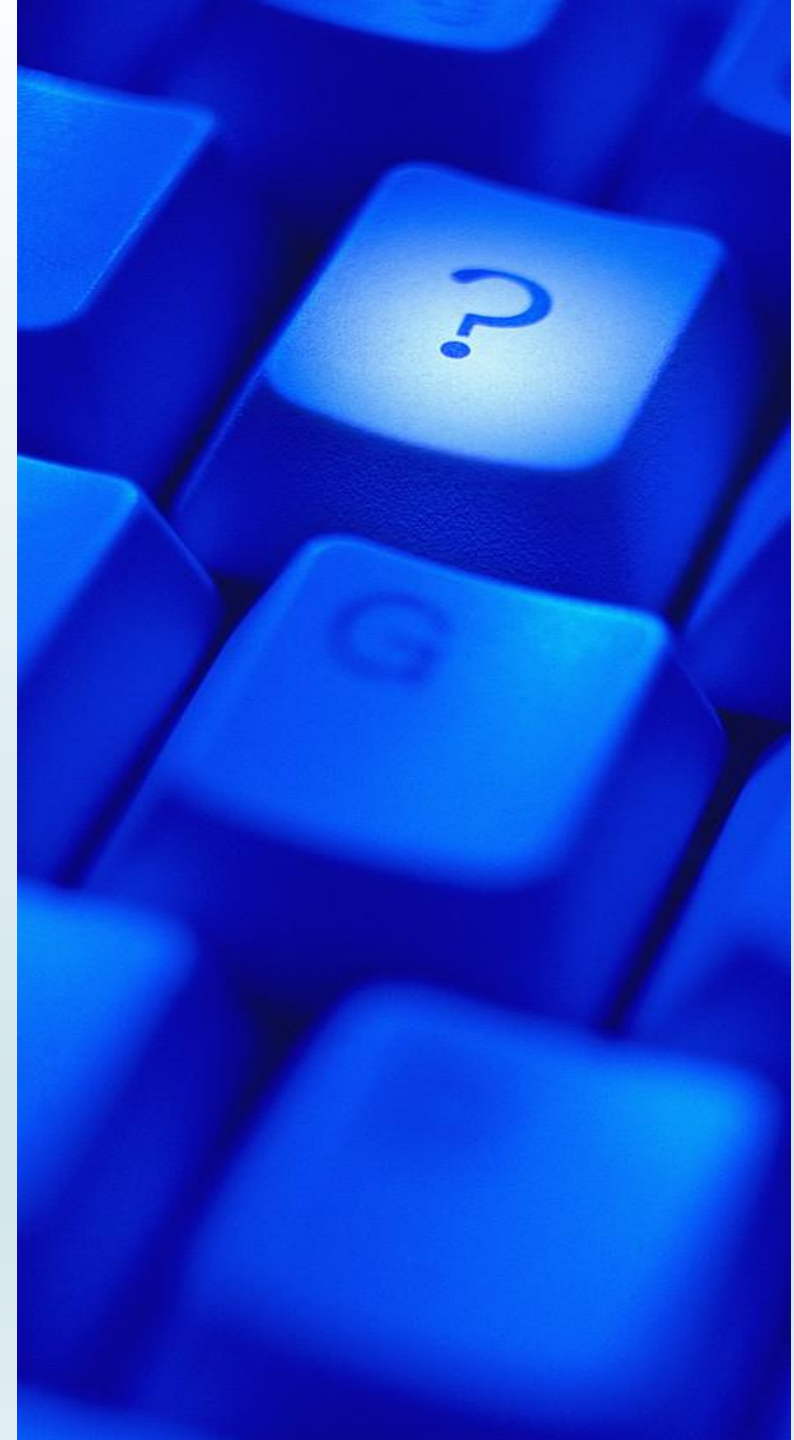




**QUESTIONS?**

**Visit us:**

**[www.palaborandemploymentblog.com](http://www.palaborandemploymentblog.com)**



# UNDERSTAND AND NEGOTIATE SUPPLY CHAIN INTERRUPTIONS AND IMPACTS OF MATERIAL PRICE ESCALATION AND LABOR SHORTAGES

## Contract Bidding and Negotiations

Michael D. Klein, Esquire  
NcNees Wallace & Nurick, LLP  
1200 Koppers Building – 436 7<sup>th</sup> Avenue  
Pittsburgh, PA 15219  
Office - 412-227-2500  
Cell - 412-996-5394  
[mklein@mcneeslaw.com](mailto:mklein@mcneeslaw.com)





# Industry Issues

- Unavailability of material/equipment
- Delayed delivery of material/equipment
- Price escalation
  - Post Bid increases
  - Unpredictability
  - Suppliers not holding pricing



# Industry Issues

## ■ Labor shortages

- **COVID 19 Impact – fewer workers**
  - Manufacturing
  - Trades
  - Transportation – trucking / shipping
- **Economic recovery**
- **Other Commercial factors**



# Causes of Industry Shortages and Escalation

## ■ Impacts of Pandemic

- **Government and Owner Project suspensions**
- **Government actions**
  - Unemployment benefits / Labor shortages

## ■ Texas Ice Storm - Insulation



# Project Impacts

## ■ Unavailability of materials/equipment

- Commercial impacts to delivery and pricing
- Suppliers increasing pricing post bid
  - Refusing to deliver without prepayment
  - Projects held hostage
- Contractors / Subcontractors – at risk for default
- Material / Equipment – delayed delivery or unavailable entirely



# Project Impacts

## ■ Steel shortages

- Industry-wide shortage connected to Pandemic/other commercial factors
- Mill fabrication slots committed to other projects
- Certain types of steel unavailable
  - Decking and joists
  - Requires creativity
  - Owner / architect – joists v. beams (other VE options)

## ■ Other material shortages

- MEP (RTU units), roofing and FF & E



# Project Planning

## ■ Bidding

- Candid conversations upstream AND downstream
- Understand risk of pricing and schedule delay
- Descope design subs and suppliers
  - Identify specific areas of risk

## ■ Bid Clarification

- Bid good until date certain – contract award v. commencement of work?
- Lock-in pricing





# Project Planning

## ■ Schedule and Sequencing

- **Limited Notice to Proceed**
  - Request authority to purchase long lead or problematic materials
- **Multiple milestones and phased completion**
  - Substantial Completion for Project
    - Long lead items – labor date

## ■ Value Engineering

- **Availability of materials**
- **Find new methods of construction**
  - Joists v. beams



# Project Planning

## ■ Price Escalation

- **Identify at-risk materials and equipment**
  - Identify potential impacts upstream and downstream early
- **LNTP –Early purchase of materials and storage / payment for stored materials and storage costs**
- **Material price escalation**
  - Establish unit price for at-risk materials
    - Baseline to evaluate incurred cost (ex: public projects – asphalt, concrete, fuel)
    - Material Indices v. Quotes



# Considerations for Negotiating Contracts

- **Project Delivery System – Lump Sum v. GMP**
  - Contingency for material price escalation
  - Allowances
  - Practical Consideration - Cost is cost!
- **Material Price Escalation Clauses**
  - Identify specific material/equipment
- **Shared Burden**
  - Apportion risk of material escalation amongst project participants



# Considerations for Negotiating Contracts

## ■ Force Majeure

- Read your FM or COVID clauses
- Understand what is covered – what are your liabilities?
- Consider adding labor and material shortages and unavailability
- FM – only extension of time/no increase in cost in many agreements!
- Coordination of FM clauses
- Negotiate the cost impact<sup>1</sup>



# **Time to Get Creative**

**Formulating claims and defenses in the context of  
COVID supply chain disruption, labor shortages,  
and related impacts**

David Levine

**[dlevine@mcneeslaw.com](mailto:dlevine@mcneeslaw.com)**



# Risks of Non-performance

- **General Contractors / Primes**
  - Delay costs
  - Liquidated damages
  - Default
  - Prequalification impact
  - Surety / Performance bond / GAI





# Risks of Non-Performance

- **Subcontractors**
  - Breach of Contract
  - Liability for LDs
  - Consequential Damages
  - Actual Damages



# Contract Clauses

- **Unforeseen Conditions**
- **Force Majeure**
- **Cost Escalation Clause**
- **Changes Outside of Contractor's Control**
- **No Damages for Delay**
- **Continued Performance Pending Dispute Resolution**
- **Liquidated Damages**



# Unforeseen Conditions

- **Conditions that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the contract documents**
- **Does the language expressly limit the events to “physical” conditions**
- **Does the supply chain or other pandemic-related condition qualify under the clause**



# Force Majeure

- Unforeseeable circumstances that prevent a party from fulfilling a contract
- Sometimes referred to as “acts of God” or act outside the control of the parties

- **See AIA A201 (2017) §8.3.1**

If the contractor is delayed at any time by... unusual delay in deliveries...or other causes beyond the contractor’s control...time shall be extended...

- **See Consensus Docs form 200 §6.3.1**

- Adds reference to “epidemics”
- Entitlement only to extension of time

- **See F.A.R. §52-249-14**

Contractor not liable for default if failure to perform arises from causes beyond the control of the contractor



# Continuing Contract Performance

- Pending resolution of claims, contractor shall proceed with the performance of the contract without interruption
- Does owner have obligation to pay for work or disputed work pending resolution of claims



# Common Law

- **Frustration of Purpose**
- **Impracticability of Performance**
- **Mutual Mistake of Fact**
- **Impossibility of Performance**
- **Lost Productivity**
- **Unenforceability of LDs**
- **Cardinal Change**



# Frustration of Purpose / Impracticability

## ■ Restatement (2<sup>nd</sup>) Contracts

- Event makes performance impracticable or frustrates the party's purpose
- Through no fault of his own
- Non-occurrence of the event was a basic assumption
- Effort to overcome
- Temporary suspension of obligation



# Analogous Arguments Under Uniform Commercial Code

- **Generally inapplicable to contracts for service**
- **2-615 Excuses performance when a duty is made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption**





# Liquidated Damages Unenforceable

- Do the circumstances give rise to excusable delay?
- Unenforceable Penalty – court will not enforce a liquidated damages clause that is punitive in nature
- Is it based on the value of the performance promised?
- Or, is it based on the inequity of the enforcement making it a penalty?
- Was there a mutual and/or unilateral mistake of fact at the time that the penalty provision was negotiated, even if negotiated in good faith at the time?



# Cardinal Change Doctrine

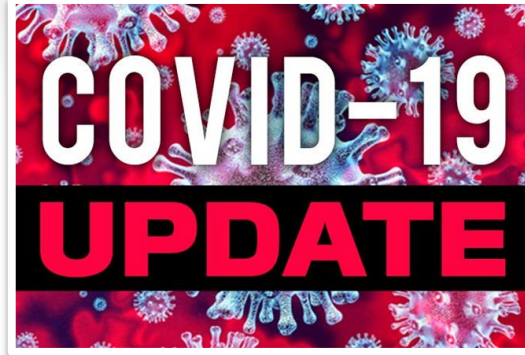
- **Is default excusable?**
- **Is it a cardinal change?**
  - Whether there is a significant change in the magnitude of the work to be performed
  - Whether the change is designed to procure a totally different item or drastically alter the quality, character, nature, or type of work
  - Whether the cost of the work ordered greatly exceeds the original contract cost
- **Must it be “ordered”?**
- **Can cardinal change arise from defacto changes due to pandemic**
- **Is there a mutual abandonment of the contract**



# COVID: Unprecedented Events with No Legal Precedent

- No decisional case law yet exists from COVID claims
- Was the supply chain disruption impact “foreseeable” at the time the contract was entered?
- Could the industry have predicted the labor impact after the first round of stimulus money?
- Could the project participants have predicted the lost productivity due to COVID precautions?
- Is performance genuinely “impossible” or is it just unprofitable?
- Is the loss so severe or unreasonable that a court would reform the parties’ contract as being outside of the assumed risk?
- Is COVID analogous to other events that cause market fluctuations that are typical in the industry?
- Which party is relied upon and/or best able to manage the risk associated with the market fluctuations?
- If a Court is inclined to award damages, how are the damages to be quantified?
- Will total cost method be disregarded?





# Q & A

Michael Klein – [mklein@mcneeslaw.com](mailto:mklein@mcneeslaw.com)

David Levine – [dlevine@mcneeslaw.com](mailto:dlevine@mcneeslaw.com)

Andrew Levy – [alevy@mcneeslaw.com](mailto:alevy@mcneeslaw.com)

