

Construction Contractor Compliance Update: Government Audits, Vax Mandates, and More

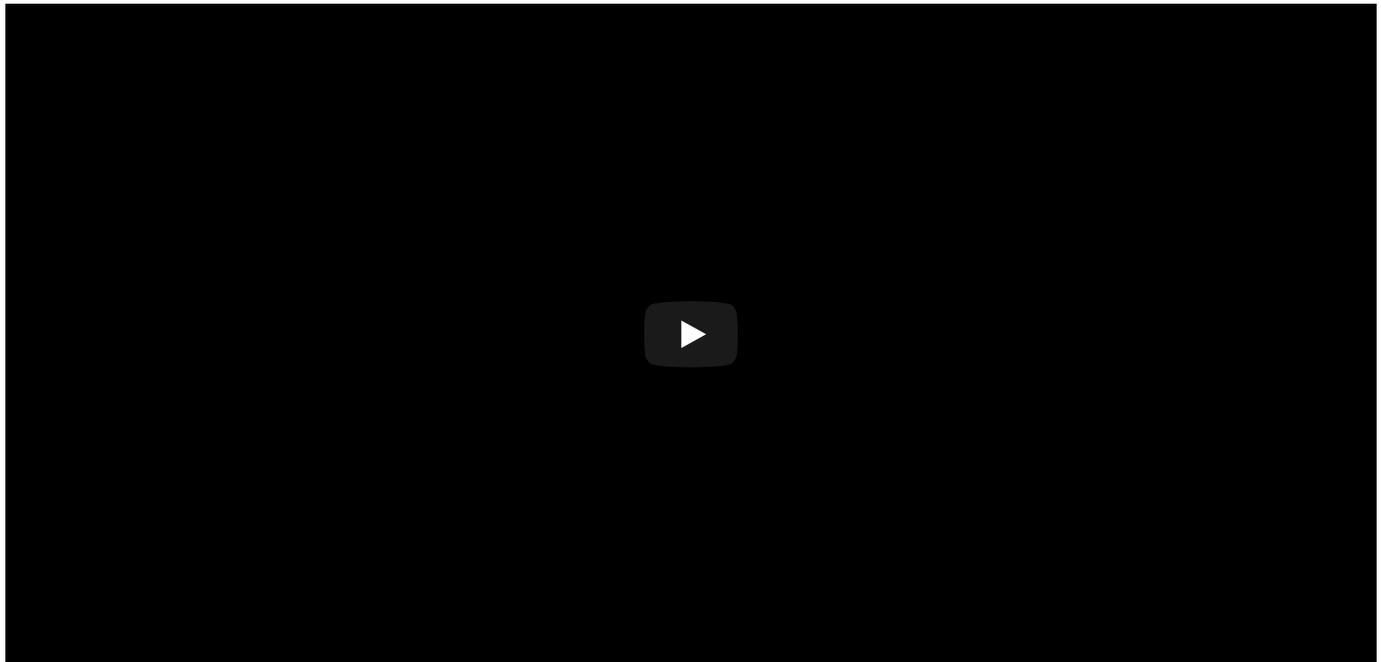
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The last few weeks have seen a flood of executive office mandates — and EEO mandates in particular — affecting employees, federal contractors, and subcontractors. Join Carlton Fields attorneys Joe McManus and Rae Vann as they discuss recent federal developments in labor and employment law and concerns for construction contractors, including the 2021 Corporate Scheduling Announcement List (CSAL), OFCCP federal contractor affirmative action requirements, COVID-19 vaccination mandates for federal contractors and on-site contractors, and OSHA's anticipated emergency temporary standard (ETS).

Transcript:

Joe McManus: Hello everyone and welcome. I am Joe McManus, president of Centinel Consulting; this is a Carlton Fields construction consultancy, one of four Carlton Fields Consultancies. I am the host for this podcast today, we're dealing with very recent Federal developments in labor employment law. I am very excited to have as my guest today, Rae Vann. She is my partner in Carlton Fields, a shareholder, where she practices in Washington, D.C. in labor and employment law. With an emphasis on EEO, DEI and Federal Contract Affirmative Action Compliance.

Rae is here today, in her capacity, as vice president of Core Triangle Consulting. Which is the firm's affiliated HR and Organizational Risks Management Consulting Company. Core Triangle helps clients with a range of HR, DEI and other employment related needs from the routine to the most unique strategic issues facing businesses and industry right now.

I want to start by asking Rae some background information here; there's been a flood of executive office mandates in the last few weeks. So perhaps we could look at EEO mandates and who's affected by them. Are we dealing with government contractors only, or are we dealing with all employees? Rae if you could give us some guidance on that would be wonderful.

Rae T. Vann: Absolutely. Happy to, Joe, and thank you for inviting me to participate in this important session. So, who is affected by EEO mandates that come down from the Federal Government? All employers just as a general rule with

fifteen or more employees are subject to Federal EEO and nondiscrimination requirements, such as, Title VII which prohibits discrimination on basis of race, color, religion, sex and national origin, sexual orientation, gender identity as well as the ADA which prohibits discrimination on the basis of disability, and they are others and even smaller employers may be subject to similar rules that come down at the state or local level. But beyond that, certain companies that elect to contract with the Federal Government are required to comply with additional rules - additional EEO rules and requirements including in many instances practicing affirmative action to ensure nondiscrimination against certain groups. Typically, those requirements don't kick in until contractor reaches a certain size in terms of the number of employees or the value of the contract itself and those threshold general will vary from law to law but that's general what Federal contractors are expected to do above and beyond the regular EEO and nondiscrimination requirements that other companies have to comply with.

Joe McManus: Rae, how does these mandates come down - are these executive orders issued by the White House or they come through regulations? Give us some guidance there.

Rae T. Vann: Sure. So at the Federal level, laws can be passed obviously by congress and signed into law by the president that certainly is the case with respect to Title VII and The Americans With Disabilities Act and things like that. In the Federal contractor context, they are really three main Federal Laws that contractors need to know about, one of which was actually created by executive action so, it's an executive order that President Lyndon B. Johnson signed back in 1965 - that's Executive Order 11246. The other two statutes that were passed by Congress, Section 503 of the Rehabilitation Act of 1973 also known as Section 503, and then the Vietnam era, Veteran's Readjustment Assistance Act or better known as VEVRAA. So, those are two statutes. The Executive Order came about as a result again - by virtue of Executive Action from President Johnson. So, the Executive Order applies to all Federal Contractors and Subcontractors with direct or federally assisted government construction contracts, as well as supply and service contractors so they are covered too. But, in the construction context specifically, it applies both to direct and federally assisted construction contracts that are valued in excess of \$10,000. So, like Title VII, Executive Order 11246 prohibits discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity and national origin. But beyond that, it also requires affirmative action to ensure Equal Employment Opportunity for women and minorities. So - just one point about the Executive Order, it was as I've said put into place, issued by President Johnson back in 1965 but it's been amended a number of times since then, most recently to incorporate protection for individuals identifying as LGBTQ. As far as section 503 is concerned - so, Section 503 is part of the Rehabilitation Act and that prohibits discrimination against individuals with disabilities and also requires covered contractors and subcontractors to take affirmative action to employ and advance qualified individuals with disabilities. So, it's like the discrimination protections or very similar to those of the Americans with Disabilities Act which apply to all employers that have more than 15 employees, generally.

In the Section 503 context the nondiscrimination requirements apply to contractors who only, who have direct contracts that are valued in excess of \$15,000. So, Section 503 doesn't apply to contractors with only federally assisted construction contracts at all. With respects to Section 503's affirmative action requirements including the obligation to prepare annually a written affirmative action program or plan - that requirement applies to contractors with both 50 or more employees and again, at least one direct federal contract that's valued at \$50,000 or more, OK. Similarly, VEVRAA prohibits discrimination against certain categories of protected veterans prohibits and also requires affirmative action to advance veteran employment opportunities. That too applies only to direct construction contractors, so, if anyone listening is not a direct construction contractor and is not a supply and service contractor, VEVRAA and Section 503 do not apply to them. Under VEVRAA, for the affirmative action and nondiscrimination coverage of portions only apply to contracts valued at above \$150,000 so the thresholds are little higher there. With respect to affirmative action, those requirements don't kick in for contractors with respect to VEVRAA - unless and until they have, they meet the \$150,000 contract amount threshold and they also have 50 employees.

So VEVRAA, as the name suggests, has been on the books for decades - over four decades. It was enacted shortly after the Vietnam War. Ironically, just a piece of trivia: Vietnam era veterans no longer are protected veterans under VEVRAA. They were removed by virtue of an amendment to the law back in 2002. The categories of covered veterans are outlined in the regulations.

Joe McManus: Well that's depressing news since I was a Vietnam veteran era Captain of the Air Force. It's a bit depressing, but speaking about depressing, my federal construction contractor clients are concerned about what we understand to be called - I believe, the Corporate Scheduling Announcement List. Can you - does that list exist? Are they rightly concerned and what are we talking about there?

Rae T. Vann: Yes. So the Corporate Scheduling Announcement List, more fondly known as the CSAL, is a listing that is published periodically by the Department of Labor's Office of Federal Contract Compliance Programs or OFCCP. OFCCP is the agency that enforces the requirements of the executive order, Section 503 and VEVRAA. Part of OFCCP's enforcement authority includes the ability to go in and audit government contractor compliance with those three laws and others that may apply - that also includes reviewing their AAP's to the extent that they were required to have an AAP and that sort of stuff. So getting back to the CSAL - well let me back up and say that for construction contractors, OFCCP has taken a lot of heat over the last few years for uneven enforcement or application of the rules to construction contractors, and which didn't really have a cogent strategy for selecting contractors for audit and

then, when it did conduct audits, they were not done always in a consistent and even manner.

So, what OFCCP has been doing for the last couple of years is really moving towards an audit process that is much more consistent across contractor types so, supply and service as well as construction contractor - but given some important differences in, obviously the applicable requirements, supply and service, and construction audits aren't always going to operate in the same way. So, getting back to the CSAL, as part of OFCCP's sort of revamp of its construction contractor enforcement program it began to include - really for the first time construction contractors on the CSAL, and the CSAL identifies contractor locations that have been selected for compliance evaluation. So, it is a curtesy notice that the agency gives - really providing contractors with a 45 day heads up before OFCCP starts sending out scheduling letters. So, in general, every contractor that appears on a CSAL will eventually be audited, it may not be on day one but typically, those lists exist until every single contractor has been hit or scheduled for an audit. The scheduling letter itself will inform the selected contractor of which location. In the context of a construction contractor, we are talking about the geographic area that's been selected for review and then will include additional information that the agency is seeking to review as part of the audit. So, the scheduling letter itself is important because it signals the starting point of the audit and it also sets a timeframe within which information is to be supplied to the agency.

Joe McManus: Well, what does the contractor do when they gets the notice and signaling the start of the audit. What does the contractor do at that stage - call his lawyer, call his HR people? What's your advice along those lines?

Rae T. Vann: All of the above, right? As a practical matter, 30 days typically is not enough time for a contractor to compile and to prepare all of the information that it's going to need to collect to send off to OFCCP. So, going back to the CSAL, it's important to the extent that you can take advantage of that 45 days heads up to start getting your record keeping and reporting house in order. For example, contractors that are subject to the executive order, Section 503, and VEVRAA are going to receive as part of the scheduling letter three separate itemized listings so, these documents outline, again, the information that OFCCP wants to see. As for those specific items, the executive order, for example, has sixteen requests on the itemized listing that seek extensive and sometimes voluminous payroll and employment transaction records for all construction trade employees who worked in that particular selected geographic area over the prior twelve month period.

That's the other important aspect to the scheduling letter, it sets the twelve month lookback period so you know how far back you have to go in terms of pulling records and information. The Section 503 and VEVRAA lists each contain items that have to be submitted including copies of the relevant written AAPs. So, something that I didn't mention at the outset is that for construction contractor subject to the executive order, unlike supply and service contractors, there's no obligation to maintain a written affirmative action plan but, their compliance consist with meeting these sixteen affirmative action steps that are setup in the regulations, and they are largely reflected in the itemized listing and the type of information that OFCCP will request. So, in terms of what OFCCP looks for during the audit they're focusing their efforts on the contractor's compliance with the specific EEO and affirmative action requirements set out in the regulations with respect to the executive order or VEVRAA or the regulations enforcing the executive order of VEVRA in Section 503. For purposes of the executive order, we are looking at goals and timetable. Progress towards participation rate goals which are set in the regulations. They haven't changed since 1980. They are the same as they were when they published in the Federal Register back in the late 70's and again, in 1980. But with respect to females, contractors are expected to make progress towards meeting a 6.9 percent female participation rate goal and with respect to minorities the goal changes depending on the metropolitan area - metropolitan statistical area and those are set out in the OFCCP's regulations as well.

Joe McManus: Yes, you mention compliance. They're seeking evidence of compliance - well, I can imagine a situation where a particular contractor in a particular geographical area is not in what OFCCP believes is full compliance. I mean, where are we now or are we in a penal situation or are we in a situation where OFCCP is urging action or demanding action within a certain period of time - what happens because, again, the regulations are comprehensive, they are confusing, OK, and so, what is one to do with that and what is the effect of your not being in total compliance with that?

Rae T. Vann: Right. I'm going to offer you three words, Good Faith Efforts. That is what OFCCP expects from Federal Government Contractors: to exercise good faith efforts to achieve equal employment opportunity and to advance EEO through their affirmative action efforts. The participation rate goals for example, those are not quotas; they are essentially goals that you're supposed to use good faith efforts to try to achieve. Now, if you've got a contractor that's woefully out of compliance, an audit likely will or could result in some notice of violations, right. Technical violations or substantive violations - technical violations typically consist of the record keeping stuff. You fail to keep accurate records of your applicants or you failed to maintain a written affirmative action plan when you were supposed to. The more significant violations are the substantive violations, and those typically are where there are indicators of discrimination against women, men, a particular minority group, minorities in the aggregate, that sort of thing, and whenever you have a substantive discrimination violation that OFCCP has found, it is authorized and often will seek victim specific relief in the form of monetary damages as a part of a conciliation agreement. Now, the agency also has spoken for many years now about wanting to provide technical assistance to contractors especially newer contractors that aren't as familiar with this whole process - so the agency says - and often will try to help especially newer

contractors understand how to better comply even through the course of an audit.

Joe McManus: OK, so it's not a malevolent process we're going through here where they are on a quota system to find a contractor not in compliance? I mean - and I take it that the administrators that are running the OFCCP now are aligned with that philosophy and that they're looking more to have contractors understand where they're falling down and encourage them perhaps with another audit to comply?

Rae T. Vann: Generally, and certainly most definitely on paper, but the enforcement philosophy of OFCCP tends to change depending on the enforcement philosophy of the administration in charge. So, under the Trump administration, OFCCP certainly took its enforcement charge and mandate very seriously but it also introduced more of the compliance assistance and carrot-versus-stick approach to compliance than we typically have seen in some democratic administrations. The Biden administration OFCCP is being headed up by Jenny Yang, who's former chair of the Equal Employment Opportunity Commission, she's also former Plaintiffs' class action attorney with one of the largest, preeminent plaintiffs' class action law firms in the country and she was actually counsel of record in the Dukes versus Walmart litigation that went all the way up to the US Supreme Court focusing on gender pay and inequality and pay discrimination. She is very much focused on gender and race pay equity and systemic discrimination.

Joe McManus: That's very helpful for our construction clients out there knowing that is her focus and that ought to be their focus.

Rae T. Vann: Yes.

Joe McManus: And I take that if someone fails to submit to an audit or it comes out woefully short on compliance, I take it that they're so draconian downstream results that can occur.

Rae T. Vann: Yeah, absolutely. Contractors are obligated to submit to an audit if OFCCP comes knocking; you cannot say no one is home and turn them away. There are pretty severe potential consequences for doing that, OK. Failure to submit to an audit can and typically will have pretty serious consequences for the contractor including immediate referral for administrative enforcement by OFCCP which means basically you're being sent into administrative litigation before the administrative review board or the office of administrative law judges to begin with and OFCCP can request and seek a range of penalties for a contractor even in a denial of access case, including contract suspension, cancellation or even contractor debarment. You may recall the big Baker DC case that came down a few years ago, that's what happened there - that was a denial of access case. The contractor challenged OFCCP's legal authority to conduct the audit (and it had good reasons for doing so) but what it did was refuse OFCCP access, which led OFCCP to file an administrative complaint with the office of administrative law judges that then went to a hearing. Not surprisingly, the ALJ came down on the side of OFCCP; administrative law judges and even judges tend to defer pretty heavily to Federal agencies and their interpretation of the law. That contractor did pursue an appeal and eventually got the ruling reversed after what was likely a very costly litigation process. So again, you certainly can refuse OFCCP access to your records or refuse to participate in an audit, but there will be consequences.

Joe McManus: Let's switch over to COVID. Because it won't go away, all right and just like government agencies like CDC are under attack for potentially overstepping their grounds. I mean, executive office seems to be throwing out right to work plans, etc. Can you give us some guidance on where we are going with that and how we should be dealing with this?

Rae T. Vann: Yeah. So, the most recent major action that was taken by the administration came down just before Labor Day where the administration issued a couple of executive orders and made an announcement with respect to policy changes in the area of Covid so - but let me step back. So back in July, at the end of July the White House issued this fact sheet announcing new safety protocols for Federal Workers and onsite employees of Federal Contractors. This was designed to step up efforts to prevent the spread of Covid-19 especially in light of the Delta Variant and how dangerous and widespread that had become.

What the facts sheet said was that Federal Government employees and onsite contractors would be asked essentially to attest to their vaccination status and anyone who failed or refused to do so would have to: (1) wear a mask at work all the time regardless of where they were working; (2) maintain physical distancing of course, from other workers and visitors; and then one of the more controversial aspects to this would be that they would have to (3) comply with a weekly or twice weekly Covid screening test requirement and then of course, there would be restrictions on those folks' ability to travel for businesses and things like that.

What was unusual about the fact sheet was that there wasn't an executive order that came with it. Typically, those type of fact sheets are issued as part of an executive action -- announcement of an Executive action or new Executive Order. Here, there wasn't anything that was immediately executable that came along with that fact sheet but obviously we were expecting something more to come. That did come last week in the form of an Executive Order called the "Executive Order on Ensuring Adequate Covid Safety Protocols for Federal Contractors". That EO was signed by President Biden shortly after Labor Day, on September 9th of last week.

Joe McManus: Before we get into that - because I want to get into the details of that particular September 9 order but, onsite employees of federal contractors. Well, I think a construction contractor could figure that out because contractor is doing a job on a particular site and so, but what about - I can see that as a very expansive term - you have

a contract and you a supplier to the Federal government. Are you providing services to the Federal government? I mean, are we including all of these people?

Rae T. Vann: Right!

Joe McManus: And if a law firm is under a contract with the Federal Government to do - assist them for example on a labor issue or to provide advice on a EEOC matter, all right. Is the law firm subject likewise to this executive act which is being - it's been signed on September 9th?

Rae T. Vann: You're not going to like this answer but, we don't know and we don't know because the fact sheet was very, very short on specifics and details. In fact, thing that the Executive Order essentially said was, "we're going to require certain safety protocols be put into place for federal contractors but only after the safer Federal Workforce Taskforce issues guidance that spells all of these things out," for instance, identifies key definitions like, what an onsite employee or contractor is, and other specific requirements. The other thing that's noticeable about the Executive Order is that it doesn't mention the word vaccinations.

It does not purport to mandate vaccinations whereas the fact sheet talks specifically about vaccinations and testing and things like that. So what the Executive Order has done is left those details to the task force but even with respect to the guidance that the task force is going to issue, the Executive Order 14042 says specifically that the guidance won't become effective unless and until the White House Office of Management and Budget (OMB) approves it and signifies its approval in a notice published in the Federal Register. All of this is supposed to happen by next Friday, September 24th. I don't know whether it will. I will say though that yesterday the task force updated some FAQ's that it has on the website specific to Federal contractors as well - there's a section that talks about Federal contractors and one of the questions that it has on here is "can agencies incorporate vaccination requirements into contracts that are not covered by this new Executive Order?" The FAQ repeats basically what the Executive Order said, which is, "we strongly recommend agencies to do so" but clearly it's not establishing a mandate and they say you got to wait on the guidance that is forthcoming.

Joe McManus: I imagine the lobbyist are lined up pretty hard pretty [*inaudible*] in the executive office building. OK. What about Federal Grants. None of our clients are - especially if infrastructure bill ever gets passed you are going to see a lot of grant money coming out especially for water, sewer, etc.

Rae T. Vann: Yes

Joe McManus: I mean, or does this go to the grantees, the various public municipalities and agencies of the state or a local - where does it start and end, if they were to get grants?

Rae T. Vann: Yes. Well that's a good question. Although the Executive Order was pretty short on most details, it did specify certain exemptions: Federal Grants are excluded from the Executive Order as are contracts or subcontracts whose value is equal to or less than the Federal Acquisition Requisition Simplified Acquisition threshold which right now is \$250,000. So even for Federal Contractors with relatively smaller contracts valued at less than \$250,000, these rules whenever they're published are not going to apply to them. But getting back to your specific questions, the Executive Order states specifically that the requirements will not apply to Federal grants.

Joe McManus: OK. Dealing with Federal construction contracts on a daily basis, OK. We're immersed FAR (Federal Acquisition Regulations). Where does - is FAR going to have a place at the table here? Are we going to - because that's where, the first, the first place we go, OK, with - on any Government contract issues?

Rae T. Vann: Absolutely! So the executive order actually directs the FAR Council to address the language. One of the key requirements under the Executive Order is that contractors will have to include basically a COVID clause in their contracts, and contracting officials obviously on the agency side will incorporate a COVID Clause like the EO Clause that is contained in contracts that sets out the requirements that are going to be fleshed out. So, the Executive Order says "FAR Council, you need to revise the FAR to incorporate this new COVID Clause requirement, essentially.

Joe McManus: The action that is due next - next Friday, all right, do you expect it to be also flowing down to the subcontractors either as a - as published in FAR or, is there going to be any obligation on the contractor to flow it down it down to the subcontractor?

Rae T. Vann: Absolutely, there is! The Executive Order specifies that there shall be essentially a flow down clause for requirement that contractors are going have to include the clause in their subcontracts as well.

Joe McManus: Finally, I guess we want to talk about OSHA. OSHA has been some ways widely erratic at the same time very, very, very busy trying to issue regulations and also to enforce their requirements and closing down some - certain jobsites also, OK. Where are we with regard to OSHA, and public and private construction contractors?

Rae T. Vann: Very, very interesting. So, on the same day that the President issued the Federal Contractor Covid Executive Order, the White House announced that it had directed OSHA to issue an Emergency Temporary Standard, or an ETS, that would apply to all employers with 100 or more employees including Federal Contractors, Construction Contractors, Supply and Service and so forth that would mandate vaccinations or weekly testing. This statement and directive to OSHA was much more specific than the Executive Order with respect to mandating vaccinations or,

alternatively, weekly testing. What's also interesting about that directive is that the White House wants this done yesterday and when you think back to the ETS that came out earlier in the year that applies to health care - companies in the health care industry - it took weeks for OSHA to write that ETS and the expectation I think is that OSHA and the task force are going to issue guidance around the same timeframe so, we're talking a couple of weeks from now and I just don't see how that can happen as a practical matter. As you pointed out, OSHA inspectors are out there on sites - on work sites, you know, enforcing what's already on the books. It's going to be a very heavy lift for OSHA to develop this ETS that's going to apply basically to a huge universe of employers while also continuing to enforce what's currently on the books.

Joe McManus: Yeah! And OSHA was the subject of our webinar. At the beginning of Covid we had OSHA representative there on how they were struggling to deal with it and seems like, you know - now you're talking about directives for all employees with 100 people or more to get vaccinated or tested is going to be significant. You think there is going to be an overstep by OSHA like the CDC mandates that are coming down? Is it going to be tested? I imagine it will be tested in the courts?

Rae T. Vann: Oh sure! Organizations and advocates are already positioning themselves to challenge whatever comes out of OSHA and it will be interesting because they're still so many questions to be answered separate and apart from the ones that we've heard so much about. You know, who's going to pay for these weekly tests? If you have a worker who refuses to attest to his or her vaccination status and therefore presumably is now required to submit to weekly testing, is the employer going to pay for it? That you can imagine can and will become very, very costly in a very short period of time potentially.

Joe McManus: Yeah, and I had read somewhere that the standards that require an employer to pay paid leave to people...

Rae T. Vann: Yes.

Joe McManus: ...for I don't know what - I guess for Covid recovery or...

Rae T. Vann: Yes, right. And so, another question is, whether OSHA even has the legal authority to enforce that type of mandate.

Joe McManus: Yes, someone decides that they're not going to get vaccinated because they don't believe the government - so they don't get vaccinated and they end up in the hospital and yet OSHA is demanding that, that employer pay that employee throughout the entire period of hospitalization.

Rae T. Vann: Well, hopefully it would not be months or years. Hopefully, whatever period of paid leave is mandated would be shorter but, yes. You know, just to riff off of your example, if an employee is out for a couple of weeks because of infection or whatever it is, they get fired, they sue the employer for failing to have provided protected paid leave during that period of time, does the complaint go to OSHA and how does OSHA enforce that? Or is there going to be some coordination between OSHA and DOL or some agency - other agency to enforce compliance. There's so much that's still to be known.

Joe McManus: Yeah. Well I think, I think that what we've learned today, at least what I've learned today is that we need to have a part two of this podcast after next Friday, and thereafter as things beginning to shake out, all right, so we can give further guidance to our contractor - Federal subcontracting and non-Federal over 100 employees - there's going to be so many issues that are going to be ripe for discussions so, let's commit ourselves to do that for our listeners.

Rae T. Vann: Absolutely.

Joe McManus: And we will take care of that. Any other final thoughts here, Rae?

Rae T. Vann: I, would just say, especially immediately after the Executive Orders came out, there was a lot of doom and gloom sort of sky is falling analysis and media coverage. I would just say to take a step back and breathe. We don't know what the requirements are going to look like. We have no idea what is being developed or formulated at this point and time so we just have to take a wait and see approach - position ourselves to be receptive to what we're going to have to do but don't panic at this point.

Joe McManus: Yeah. Well, I'm sure that the listeners are going to be - have a number of questions that they have now or will have shortly thereafter, and they can get in touch with you RVann@CarltonFields.com or JMcManus@CarltonFields.com or reach out to you at Court Triangle or me, at Centinel Consulting and we will be happy to help out. But thank you everybody for listening, today and we will see you in perhaps - in a short month.

Rae T. Vann: Thanks!

Joe McManus: Bye, bye now.

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