

## Client Alert

# O'TOOLE SCRIVO

ATTORNEYS AT LAW

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## New Jersey Requires Vaccination or Weekly Testing for Privately Employed Workers Performing Services on State Contracts

On October 20, 2021, Governor Murphy signed Executive Order 271 ("EO 271"), requiring businesses or persons who contract with the State to maintain policies that require their workers to either receive a COVID-19 vaccination or submit to weekly testing. Many aspects of EO 271 follow requirements recently put into effect for federal contractors; however, there are key differences of which public contractors should be aware.

### What Does the Executive Order Require?

EO 271 requires any agreement between a State executive department or agency ("State") and an outside contractor to include a clause requiring the contractor and subcontractors of any tier to maintain a policy requiring their workers to either (1) provide proof of full COVID-19 vaccination, or (2) submit to testing at least once or twice weekly. The same clause must also appear in any subcontracts.

### Which Contracts Are Covered Under EO 271?

The Executive Order applies to any new contract, new solicitation for a contract, extension or renewal of an existing contract, or exercise of an option on an existing contract, if the subject of the contract is:

- Services;
- Construction, including demolition, remediation, removal of hazardous substances, alteration, custom fabrication, repair work, or maintenance work; or
- A leasehold in real property through which the contractor's workers have access to State property.

### Which Contracts Are Not Covered Under EO 271?

EO 271 does not apply to any contract not of the type listed above, and also does not cover:

- Contracts not paid at least partially from State funds;



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- Financial assistance, such as grants, bonds, loans, or tax credits;
- Contracts or subcontracts valued below the public bidding threshold, which is currently \$44,000 for Division of Purchase and Property contracts and \$71,000 Division of Property Management and Construction contracts;
- Employees performing work outside of New Jersey; or
- Contracts solely for the provision of goods.

### **Are Current Contracts Covered by EO 271?**

No. EO 271 does not apply to current contracts. Instead, the requirements of EO 271 will only apply to new contracts, new solicitation of contracts, contract extensions or renewals, amendments to current contracts, modifications of current contracts, as well as when an option is exercised under a current contract.

While EO 271 does not apply to active contracts, public contractors should be aware that state agencies may begin to send – as federal agencies have begun to – contract amendments or modifications for execution. While contractors technically will not be required to execute these amendments, their cooperation with the State may be considered during future bidding.

### **Are All Employees of a Covered Contractor Required to Be Vaccinated or Undergo Weekly Testing?**

No. The vaccination and/or testing requirements of EO 271 apply only to “covered workers.” They do not apply to the contractor’s entire work force. Employees subject to the requirements of EO 271 include full- or part-time workers who work “on or in connection with” a State contract that requires that worker to physically deal with the State. Specifically, it covers workers who “enter, work at, or provide services in” any location:

- where the State conducts official business,
- that is within the State’s jurisdiction, custody, or control, or
- that relates to offering services for State employees, their dependents, or the general public.

The Governor has not provided any additional guidance about what it means to “relate[] to offering services for State employees, their dependents, or the general public.” However, in the Governor’s statement accompanying EO 271, the Governor confirmed his intention to require vaccination or testing for all “employees who enter, work at, or provide services in any state agency location.”

In that respect, the requirements of EO 271 seem to be much narrower than the recent federal guidelines, limited to employees who perform some service at a public work site related to the State contract. Without further guidance, questions remain about if and how EO 271 applies to employees who do not go on location to service State contracts.

### **When Is a Covered Worker Considered Fully Vaccinated, and How Can the Employee Provide Proof?**

A worker is considered fully vaccinated against COVID-19 two weeks after receiving a one-dose vaccine or the second dose of a two-dose vaccine. Only vaccines approved or authorized by the FDA or the WHO are acceptable.

Proof of vaccination includes:

- a CDC COVID-19 vaccination card, or an electronic copy thereof;
- an official record from the New Jersey Immunization Information System or other State registry;
- a record from a health care provider’s portal or medical record system on official letterhead signed by a licensed physician, nurse practitioner, physician’s assistant, registered nurse, or pharmacist;
- a military immunization or health record form the U.S. Armed Forces; or
- a mobile phone record from Docket or any other state-specific application,

so long as the record lists an approved vaccine and the date of administration.

A contractor collecting this information from its workers must comply with all federal and state laws that regulate the collection and storage of information, including ensuring the confidentiality of such records.

### **How Can an Unvaccinated Worker Satisfy the Testing Requirement?**

A covered worker who is not fully vaccinated must undergo screening testing at least once per week. The contractor can either require proof of testing or can furnish on-site access to testing. In either case, it is acceptable to use antigen or molecular testing that has Emergency Use Authorization by the FDA or that is performed per the Laboratory Developed Test requirements set by the U.S. Centers for Medicare and Medicaid Services.

A covered contractor's policy need not require testing for a covered worker in any week in which that worker is not working on-site.

### **What Must a Contractor Do with Test Results?**

Contractors are required not only to track any and all test results, but also to report those results to the local public health department.

### **Who Is Required to Pay for Testing/Vaccination?**

EO 271 does not identify who is responsible for any costs associated with testing and or vaccinating covered workers. In addition to the direct cost of testing, covered contractors should be mindful that they may be required to compensate exempt employees for the time spent being tested under state and federal law. Issues related to payment are of particular concern for contractors with unionized workforces that may have to bargain over these types of "impact" issues.

### **Can Contractors Impose Stricter Requirements?**

EO 271 sets forth the minimum acceptable standards for a contractor to deal with the State. It does not prevent contractors from imposing additional or stricter policies, such as more frequent testing of unvaccinated workers or mandatory testing for a larger class of employees. Of course, any policies must be adopted in accordance with other state and federal laws.

### **How Do Contractors Prove Their Compliance with EO 271?**

During the bid process, contractors will not have to be fully compliant; however, they will have to certify that they will implement the required policies by the time the contract is executed. Once the contract is awarded, contractors will have to certify compliance each time they submit an invoice, which certification is for the time period covered by the invoice.

### **When Does This Requirement Become Effective?**

Immediately. While current contracts are not subject to EO 271, for companies that do business with the State, it is important to inventory any and all public contracts to determine when compliance may become required, whether through public bidding, or a renewal, amendment,

or modification of the contract, and to determine which employees may be impacted. Failure to properly plan for compliance with EO 271 may compromise significant future revenue for businesses. Experienced counsel can assist you with developing policies that comply with EO 271 while ensuring ongoing compliance with other state and federal laws.