



## CUT AND PASTE POST NOVEMBER, 2021:

### VACCINE MANDATES: THE SAGA CONTINUES

On September 9, 2021, President Biden signed [Executive Order 14042](#), *Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors* (EO-14042), requiring covered federal contractors to mandate that their employees are fully vaccinated against COVID-19. EO-14042 exempts employees who qualify for a religious or medical exemption to the vaccination requirement. On September 24, 2021, the White House’s Safer Federal Workforce Task Force issued guidance on the provisions of EO-14042.

#### *So, What Happens When State or Local Laws Are Inconsistent with the Federal Mandate?*

The [Safer Federal Workforce website](#) says EO-14042 and its associated guidance ‘overrides any state or local laws that would prohibit compliance; however, “more protective” state or local COVID-19 laws would continue to apply.’’

Not so quick, according to Mark Feddes, an employment attorney with Crowley-Fleck Law firm.

On October 15, 2021, Crowley-Fleck sponsored a webinar covering a broad range of HR issues. For those who could not attend, the webinar included a discussion about how the conflict between EO-14042 and Montana law (specifically HB-702, see September 2021 *Cut N Paste Post*) affects federal contractors doing business in Montana.

During his presentation, Feddes said federal contractors who do business in Montana are in a ‘nearly impossible position’: they are going to have to decide whether to comply with HB-702, or with federal contracting requirements, which means asking yourself whether you breach your federal contract, or risk an employee discrimination complaint. According to Feddes, federal contracts usually preempt state law so, if there is a conflict, the provisions in the federal contract will likely apply, but Feddes predicted that uncertainty will continue until these issues are resolved, likely through litigation.

Feddes said EO-14042 is not effective until November 15, 2021. At that point, the Order will apply to:

- Any contracts currently in the procurement process;
- All contracts issued after 11/15/2021; and
- For those “Indefinite Delivery Contracts”, all new orders after 11/14/2021.

As of November 15<sup>th</sup>, federal contractors should make sure they carefully read their contracts and purchase orders. If they contain language requiring compliance with EO-14042, it’s not a bad idea to speak with an attorney on the steps to take to best protect yourself from liability.

*Professional Pointer:* The most obvious question is: “Am I a federal contractor covered by EO-14042? It’s easier to understand who *isn’t* included than who is, and some federal contractors don’t know they are considered federal contractors. Refer to the [Safer Federal Workforce Website](#) for information about what contractors and products are included in, and excluded from, EO-14042 coverage, the compliance deadlines, and other relevant information.

#### *Inside*

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## Tinder and Age Discrimination

I'm tired of talking about COVID and vaccinations, so I went looking for something 'fun' to read. I thought this was fun....



Beginning in 2015, the dating app Tinder began offering reduced pricing for those under 30 (it later changed this to those under 29.) In 2017, plaintiff Lisa Kim purchased a premium version of the Tinder app, but because she was already in her thirties, she paid more for her monthly subscription than those in their twenties. Kim brought suit against Tinder in federal district court for violations of California's Unruh Civil Rights Act and its unfair competition statute. Over Kim's opposition, Tinder successfully compelled arbitration. After a daylong mediation session with a retired judge, Kim and Tinder reached a settlement, before class certification, that applied to a putative class.

The settlement agreement defined the settlement class to include "every California subscriber to Tinder Plus or Tinder Gold during the Class Period who at the time of the subscription was at least 29 years old and was charged a higher rate than younger subscribers, except those who choose to opt out of the Settlement Class." The class contains about 240,000 members. Under the agreement, every class member who has or reactivates a Tinder account will receive 50 Super Likes, regardless of whether the user files a claim. In addition, class members who file a timely claim will receive their choice of: "(1) \$25.00 in cash; (2) 25 Super Likes (but only if the Class Member has a current Tinder account); or (3) a one-month subscription to Tinder Plus or Tinder Gold, depending on which of those services the Class Member had previously purchased (this option was not available to any Class Member who has a current subscription to Tinder Plus or Tinder Gold)." Finally, as part of the settlement, Tinder agreed to eliminate age-based pricing for new subscribers in California, but "reserve[d] the right to offer a youth discount to subscribers age 21 or younger."

As per California law, the settlement agreement was approved by a District Court.

Rich Allison and Steve Frye were among six class members who objected to the proposed settlement. Since the District Court had approved the settlement agreement, the case went to the 9<sup>th</sup> Circuit Court for review.

In an interesting decision, the 9<sup>th</sup> Circuit Court found the settlement wasn't "fair, reasonable, and adequate" as required under rule 23(e). Instead, the Court found that the district court calculated the settlement value based on a totally unrealistic claims rate and an unexplained injunctive relief valuation, and then found the attorneys' fee award proportional to that inflated settlement value.

For those reasons and others, the Circuit Court reversed the district court's approval of the settlement agreement, vacated the judgment and remanded the case to the district court for further proceedings consistent with the 9<sup>th</sup> Circuit's opinion.

*Professional Pointer* – Even though this case originated in California, it is a good reminder of the need to be 'age blind' in all areas, including in your employment practices.

Read the case: [Kim v. Allison](#)

## Some of What We're Watching in Washington, DC

- [H.R. 2119](#), which would amend the Family Violence Prevention and Services Act;
- [H.R. 3110](#), which would amend the Fair Labor Standards Act of 1938 to expand access to breastfeeding accommodations in the workplace, and for other purposes;
- [H.R. 3992](#), which would amend the Age Discrimination in Employment Act of 1967 to prohibit employers from limiting, segregating, or classifying applicants for employment; and
- [S. 1301](#) – Promoting Physical Activity for Americans Act.