



Federal Contractor and Subcontractor Mandatory Vaccination Guidance Published

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On September 24, the Safer Federal Workforce Task Force (“Task Force”) published its Guidance for Federal Contractors and Subcontractors (“Guidance”). The new mandates result from President Biden’s September 9th [Path Out of the Pandemic: COVID-19 Action Plan](#) (“Plan”). As part of the Plan, the President signed [Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors](#) (“Order”). The Guidance attempts to interpret the Order. Under the Guidance, all “covered contractor employees” must be fully vaccinated by **December 8, 2021**, except in certain situations where they are legally entitled to a disability or religious accommodation. There is no COVID testing alternative to this rule. This is a stark difference from the Task Force’s earlier guidance that required onsite contractor personnel to be regularly tested if they either refused to provide vaccine status or indicated they were unvaccinated. “Covered contractors” also must comply with the CDC’s guidance related to masking and physical distancing while in “covered contractor workplaces.”

This advisory provides a high-level summary of the Guidance so federal contractors and subcontractors gain a base understanding of their upcoming legal obligations. We urge you to read the Guidance in its entirety and consult with counsel about interpretation/implementation questions.

Who is a “Covered Contractor?”

The Guidance defines a “covered contractor” as a prime contractor or subcontractor at any tier who is a party to a covered contract.

What is a “Covered Contract?”

A “covered contract” is a legally binding relationship obligating one party to furnish services (including construction) and another party

to pay for them. A “covered contract” is any contract that includes a clause incorporating the Order’s requirements that the “covered contractor” then incorporates into lower-tier subcontracts. The clause must specify the contractor or subcontractor shall, for the duration of the contract, comply with the Guidance. “Covered contract” does not include “subcontracts solely for the provision of products,” but the extent of this carve-out is unclear.

In response to a FAQ (Q13), the Guidance states “[t]he requirements in the order apply to subcontractors at all tiers, except for subcontracts solely for the provision of products. The prime contractor must flow the clause down to first-tier subcontracts; higher-tier subcontractors must flow the clause down to the next lower-tier subcontractor, the point at which subcontract requirements are solely for the provision of products.” Sounds clean, right? Yet the Guidance also “strongly encourages” agencies to apply the Guidance to contracts “for the manufacturing of products” which appears at odds with the “provision of products” carve-out. We expect additional clarification on this issue in the new FAR rule to be issued by October 8.

Who are “Covered Contractor Employees?”

“Covered contractor employees” are defined as any full-time or part-time employee of a “covered contractor” (whether or not) working on or in connection with a “covered contractor” working at a “covered contractor workplace.”

“Workplace” means a location controlled by a “covered contractor” where any of its employees who are working on or in connection with a “covered contract” are “likely to be present” during the period of the performance for a “covered contract.” “Workplace,” however, does not include a “covered contract” employee’s residence. Under the broad definition of “workplace,” a number of employees who are not “covered contract employees” will be covered by the Order because they are in the same workspace, and could have contact with, a “covered contractor employee” during the “covered contract’s” duration.

Additionally, employees working on a “covered contract” on a remote basis are considered “covered contractor employees” and must comply with the vaccine requirement (unless an accommodation is granted) – even if they never work at the “covered contractor” workplace during the contract’s duration.

What are a Covered Contractor’s Legal Requirements?

- “Covered contractor employees” must be fully vaccinated (two weeks after receiving the last applicable dose) by December 8, 2021 – unless they are granted a disability or religious accommodation.
- “Covered contractors” are responsible for determining if a “covered contractor employee” is legally entitled to a disability or religious accommodation. Human Resources should strongly consider handling this exercise in consultation with counsel.
- “Covered contractors” must require “covered contractor employees” to **show or provide documentation** of their vaccination status. The Guidance sets forth the acceptable forms of evidence, including a digital photograph, scanned image, or PDF of such documentation. Human Resources should strongly consider handling this exercise and abide by all privacy and retention requirements related to medical documentation.
- “Covered contractors” must comply with CDC guidance for masking and physical distancing in specific settings (e.g. indoors, outdoors, areas of high or substantial community spread). “Mask” does not include: “masks with exhalation valves, vents, or other openings; face shields only (without mask); or masks with single layer fabric or thin fabric that does not block light.” Accommodations to the “mask” requirement can be granted for disability or religious reasons.
- To determine proper workplace safety protocols, “covered contractors” must check the CDC COVID-19 Data Tracker County View website (at least weekly) for community transmission information in all areas where they have a

“covered contractor” workplace.

- “Covered contractors” must designate a person(s) to coordinate implementation and compliance with the Guidance and any applicable workplace safety protocols.

The Guidance’s Frequently Asked Questions

The Guidance includes 21 FAQ’s that should assist “covered contractors” implementation efforts. The following are some instructive points:

- “Covered contractors” should put signage at entrances to covered workplaces providing information on safety protocols for fully vaccinated and not fully vaccinated individuals.
- “Covered contractors” are not required to provide onsite vaccinations for their employees. They must, however, alert employees of convenient vaccination locations.
- “Covered contractor employees” who already had COVID-19 are still required to be vaccinated.
- “Covered contractors” cannot accept a recent antibody test to prove vaccination status.
- The Guidance also applies to “covered contractor” workplace locations that are outdoors.
- A “covered contractor” workplace encompasses the entire “building, site, or facility” unless it can be affirmatively determined that none of the “covered contractor’s” employees on another floor or in separate areas of the building will come into contact with a “covered contractor” employee during the contract’s duration. “Contact,” in this regard, includes limited contact in hallways, elevators, break rooms, stairwells, lobbies, etc.
- Employees who perform duties necessary to the performance of the “covered contract” (but are not directly involved in the specific contract work) are covered under the phrase “performed ‘in connection with a “covered contract.”” Examples include human resources, billing, and legal review.

- The Guidance supersedes any contrary state or local law or ordinance.

The Compliance Timeline

- Contracts awarded prior to **October 15, 2021**, for which performance is ongoing must come into compliance with the Guidance when an option is exercised or an extension is made.
- **Between October 15 and November 14, 2021**, agencies will include the clause referencing the Guidance in the solicitation and are encouraged to include the clause in contracts awarded during this period but are not required to do so unless the solicitation occurred **on or after October 15, 2021**.
- The clause must be included in new contracts awarded **on or after November 14, 2021**.

There is a lot of information to digest in a relatively short period of time. We will keep you apprised of any future developments related to this Guidance and the Order.

For questions or additional information, please contact [Catherine Burgett](#), [Daniel Edwards](#), [Jeff Shoskin](#), [Steve Withee](#), or any attorney in either the [Government Contracting](#) or [Labor or Employment](#) groups.

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