



Federal Task Force Issues Guidance Regarding Federal Contractor and Subcontractor Vaccination Requirements

September 29, 2021

On September 24, the Safer Federal Workforce Task Force issued **guidance** regarding President Biden's **Executive Order 14042**, requiring COVID-19 vaccinations for employees of federal contractors and subcontractors. The 14-page guidance provides a detailed explanation of the scope, applicability, and timing of the vaccination requirement. This client alert summarizes the key aspects of the guidance.

Who is Covered?

The vaccination requirement is broad. It applies to federal government contractors and subcontractors at any tier who are parties to a covered contract that is entered into, extended, renewed, or has an option exercised on or after October 15, 2021. In addition, federal government agencies are being "strongly encouraged, to the extent permitted by law" to extend the vaccine mandate to other existing government contracts.

Subject to certain narrow exceptions, a covered government contract is any contract (or "contract-like instrument") with a federal department or agency for services, construction, leasehold interest in real property, or concessions. The vaccine mandate does not apply, however, to contracts or subcontracts whose value is at or below the simplified acquisition threshold, which in most cases is \$250,000. The requirements also do not apply to federal grants, subcontracts that are solely for the provision of products, employees working outside the United States, or certain contracts with Indian tribes.

Any full-time or part-time employee of a covered contractor or subcontractor working on or in connection with a covered contract, or working at a covered contractor or subcontractor workplace, is subject to the vaccine requirement. This means that the vaccine requirement applies to employees working at a covered contractor's or subcontractor's workplace, even if those employees are not themselves working on the covered contract, unless a covered contractor can affirmatively determine and ensure that employees working in segregated areas will not ever come into contact with a covered contractor employee during the contract performance period. The vaccine requirement also applies to employees who are not directly engaged in performing the specific work called for by the contract but who do work "in connection" with and



necessary to the contract, such as human resources and billing. It also covers employees who are working on a covered contract remotely within the United States, even if the employee never works at the covered contractor's workplace.

What is Required?

Covered contractors and subcontractors must ensure that all covered employees are fully vaccinated for COVID-19 by no later than December 8, 2021. After that date, all covered employees must be fully vaccinated by the first day of the period of performance on the covered contract. Employees are considered fully vaccinated two weeks after they receive the second dose of a two-dose vaccine or two weeks after they receive a single-dose vaccine. The guidance notes that there is currently no post-vaccination time limit on fully vaccinated status but that, should such a time limit be determined later by the U.S. Centers for Disease Control ("CDC"), that limit will be considered by the Task Force. Covered contractors must require covered employees to prove their full vaccination status by providing the employer with a copy of their vaccination record card or other official documentation of their vaccination status.

For most covered employees, the guidance does not permit alternatives to vaccination, such as routine testing. In addition, the Guidance provides that prior COVID-19 infection or antibody test results may not be substituted for vaccination. However, the guidance provides that covered employees may be legally entitled to a reasonable accommodation in connection with the vaccine requirement because of a qualifying disability or medical condition or sincerely held religious belief. This section of the guidance is presumably based on the fact that employment discrimination laws at the federal and state level may require reasonable accommodations in these situations if not an undue hardship for the employer. The guidance, thus, leaves open the possibility that an employer might consider alternatives, such as routine testing, where that would be a valid reasonable accommodation.

Covered contractors must also ensure that all individuals, including employees and visitors, comply with CDC guidance for masking and physical distancing at the covered contractor's workplace. In addition, covered contractors must check the CDC COVID-19 Data Tracker County view website at least weekly to determine the level of COVID-19 community transmission for their covered workplaces and, as applicable, adjust workplace safety protocols consistent with published guidelines.

Covered contractors must designate a person or persons to coordinate compliance with the guidance and its requirements, including providing information on required COVID-19 workplace safety protocols to all individuals likely to be present at the covered contractor's workplace.

The guidance does not specify what penalties might be imposed if a covered contractor or subcontractor fails to satisfy the vaccination requirement. However, federal contracts often provide for penalties for default,



up to and including cancellation or suspension of the contract and being ineligible for a future contract.

When Must Federal Contracts Include Vaccination Provisions?

To ensure compliance with President Biden's executive order, federal agencies will begin to incorporate the requirements of the order and the Task Force guidance into covered contracts according to the following schedule:

- For contracts awarded prior to October 15, the requirements must be incorporated when an option is exercised or an extension of the contract is made.
- For contracts awarded between October 15 and November 14, agencies are encouraged but not required to include the requirements in the contracts.
- For contracts awarded on or after November 14, the requirements must be incorporated.

Once a requirements clause is included in a contract, it becomes the responsibility of each contractor and subcontractor to include the clause in its contracts with the subcontractor directly below it - a process the guidance refers to as "flowing down" the clause. Therefore, the prime contractor must flow the requirements clause down to the first-tier subcontractors, and each subcontractor must flow the clause down to the next lower-tier subcontractor, until such time as it reaches a subcontract solely for provisions, which is not a covered contract.

How Does This Guidance Interact with Other COVID-19 Laws?

Some states and localities have issued ordinances that seek to prohibit compliance with vaccination and mask requirements. The federal Task Force guidance makes clear that President Biden's executive order supersedes any such state or local rules. Covered contractors and subcontractors must comply with the federal vaccine requirement regardless of whether they are located in a state or locality that has sought to prohibit vaccine or mask requirements.

The guidance also makes clear that compliance with other workplace safety requirements issued by the Occupational Safety and Health Administration (OSHA) does not replace a covered contractor's obligations under the Task Force guidance. Covered contractors must adhere to the federal Task Force guidance even if they are subject to other workplace safety standards.

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Because the Task Force guidance is highly detailed and complex, we urge you to contact Megan Anderson, Dorrie Larison, Dion Farganis, or your regular Lathrop GPM attorney if you have any questions about how this guidance might apply to your business.