

Federal Contractors Bracing for Implementation of Vaccine Mandate

This update was revised on November 15, 2021, to include new dates based on new guidance by the government.

Last week, the federal government began enforcing the requirements of the Executive Order 14042, "[Ensuring Adequate COVID Safety Protocols for Federal Contractors](#)" (COVID EO) and its supporting guidance. The COVID EO directs executive agencies and their departments to ensure that covered contracts and contract-like instruments include a clause that the contractor and any subcontractors (at any tier) comply with the COVID EO. Specifically, the clause requires covered contractors to follow the Task Force Guidance (Guidance) that was [issued](#) by the Safer Federal Workforce Task Force (Task Force) on September 24, 2021. Contracting agencies must include the clause in contracts entered into after October 15, 2021. The Guidance specifically imposes a requirement that all employees of covered federal contractors as well as those working "in connection with" federal contracts be fully vaccinated by January 18, 2022. In practice, however, employees should receive their first shot as early as December 7 which is the date the first Moderna vaccine shot must be given to a covered employee to be deemed fully vaccinated by January 18, 2022. (Other vaccines have shorter periods to be considered fully vaccinated.)

Guidance Coverage Obligations

The specific requirements of the Guidance are far reaching. The Guidance includes a broad definition of "covered contractor employee" as

"any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract."

Further, the Guidance makes clear that employees who are fully remote would also fall under the coverage obligations if those employees are working on government contracts.

The Guidance allows for medical and religious accommodations. However, the Guidance does not address how to handle accommodation requests. Notably, as the Guidance does not provide a testing option, it is not clear whether the government will require contractors to test employees receiving an accommodation. Notwithstanding this absence of direction regarding testing, accommodated employees would need to follow the CDC masking and social distancing protocols in a contractor covered workplace.

Broad Coverage Positions by the Government

As the initial coverage provisions of the EO mirrored those in the Obama era executive orders raising the [minimum wage](#) and requiring paid [sick leave](#) for federal workers, early views of the COVID EO narrowed its application to a small set of contractors consistent with those orders. Those earlier executive actions covered contractors who worked on Davis-Bacon Act and related construction projects, provided services (security, cleaning, cooking) on federal property, government concessions, and government permitting. Subsequent statements from the government, however, have staked out broad and novel positions based on language in the

COVID EO "strongly encouraging" the vaccine mandate in "non-covered" contracts. As federal contracting authorities have issued directions to federal contracting officers in the form of class deviations, those class deviations have picked up on versions of the "strongly encourage." Notably, NASA's class [deviation](#) includes a blanket obligation to require the clause in "acquisitions that are not covered or directly addressed by [the COVID EO]." The civilian agency class [deviation](#) encourages (though not "strongly") that the clause be included into non-covered contracts or smaller contracts. The U.S. Department of Defense's class [deviation](#) states that adding the clause for non-covered entities or existing contracts must be through bilateral modification. At first blush, the civilian and defense agencies' request to include the clause in non-covered contracts appears optional. However, contracting agencies have shared that failure to agree to the inclusion of the clauses in contracts could have adverse consequences.

In perhaps the most aggressive assertion of authority, the General Services Administration (GSA) conducted a recent [webinar](#) reflecting that government entities intend to pave their own way under the "strongly encouraged" language and take aggressive positions. Two facets of GSA's webinar merit attention and appear to be inconsistent with the COVID EO and Guidance. First, the GSA took the position that not only covered contractor employees need to be vaccinated but "anyone" who comes into contact with covered contractor employees need to be vaccinated. By referring to "anyone," GSA appears to be taking the position that nonemployees and those not working on government contracts are required to be vaccinated. Second, the GSA has stated its intent to not only seek the clause in procurement contracts for services but in contracts for products. While the COVID EO specifically exempted subcontracts for products, some initial indications were that the prime contracts for products would not be covered. GSA scuttled that thought by indicating that it would seek to cover products. While a contractor's agreement to GSA's request will be "optional," GSA insists that contractors who do not agree may be temporarily hidden from GSA websites or face other risks that damage their chances of future government contracting.

Coverage of Independent Contractors Remains Unclear

Because the COVID EO, Guidance, and other government policies focus squarely on employees, no direction exists on vaccinating independent contractors. Where it is clear that independent contractors are performing work on federal contracts, the subcontractor flow-down obligations apply, and those workers would need to be vaccinated. However, the current legal requirements result in a perverse scenario where, by way of example, an HVAC repair person working in a covered workplace for two weeks would not have to be vaccinated while the billing clerk working remotely and providing support to a covered contract would be subject to the vaccine requirement. According to GSA guidance, the HVAC repair person would be the "anyone" who comes into contact with federal contracting employees and would fall under the vaccine mandate. As noted above, however, this position seems to contradict the Guidance. Nonetheless, our view is that until further guidance is issued, federal contractors can protect themselves by requiring, at a minimum, that independent contractors provide a written attestation that they have been vaccinated or have an exemption. Independent contractor should also follow CDC social distancing and masking [protocols](#) in covered workplaces.

Contractor Takeaways

To the extent contractors are waiting for federal court intervention in interpreting the mandate, most challenges to vaccine mandates in general have failed and we do not expect a federal court to infringe on the strong presumption in the law that the federal government has the right to determine how it spends its money. In addition, state actions, such as those in Texas, Montana, and Arkansas, seeking to push back on vaccine mandates appear to be preempted by the federal mandate.

As such, federal contractors need to have in place strong compliance mechanisms to adhere to the new federal obligations. At present, contracting agencies are sending requests for contract modifications to include the clause requiring a fully vaccinated workforce. Most of those modification requests have asked contractors to agree to the clause by November 14, 2021. However, as noted above, this deadline provides contractors with little solace as workers will need to receive their first shot as early as December 7.

Where a contractor is unsure of coverage, it should immediately seek advice from counsel regarding the novel positions being taken by the government. Contractors who have received requests for modifications should also seek advice from counsel to determine whether compliance is "optional" or mandatory and to fully understand the risks associated with pushing back on the government's mandate. Subcontractors must also pay attention to these developments as many are receiving blanket certifications from their prime contractors, even where they may not be subject to the COVID EO. As such, subcontractors should seek legal counsel to assist in evaluating the risks associated with such certifications.

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