COVID-19 Workplace Safety Guidance Issued for Federal Contractors and Subcontractors Imposes Major New Employee Vaccination and Other Requirements

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On September 24, 2021, in response to the Path Out of the Pandemic: COVID-19 Action Plan announced by President Biden on September 9, and Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors (the “Order”), signed by the President the same day, the Safer Federal Workforce Task Force (“Task Force”) issued “COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors” (“Guidance”). The Guidance, which the Director of the Office of Management and Budget approved, is intended to ensure that COVID-19 safeguards are provided in workplace locations with individuals working on or in connection with a Federal Government contract or contract-like instrument. The requirements apply to new contracts awarded on or after October 15, 2021, and to contracts entered before that date when an option is extended or an extension is made.

**Executive Order 14042**

The Order requires all executive departments and agencies of the federal government to ensure that covered contracts and contract-like instruments include a clause ( “Clause”) requiring federal government contractors and subcontractors at any tier (“covered contractors”), for the duration of their contract, to comply with all guidance published by the Task Force that provide COVID-19 workplace safeguards. The Order applies to the following types of federal contracts:

1. procurement contracts for services, construction, or a leasehold in real property;
2. contracts for services covered by the Service Contract Act, 41 U.S.C. § 6701 et seq.;
3. contracts for concessions; and
4. contracts entered into with the federal government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

The Order expressly does not apply to grants; contracts whose value is equal to or less than the simplified acquisition threshold (currently $250,000), as defined in section 2.101 of the Federal Acquisition Regulation (“FAR”); contracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act; employees performing work outside of the United States; and subcontracts solely for the provision of products. Notwithstanding these exclusions, the Guidance and corresponding FAQs state that federal agencies may, and are encouraged to, incorporate the Clause into contracts not covered by the Order.

**Safer Federal Workforce Task Force Guidance**

The Guidance’s safety protocols apply to all covered contractor employees, including contractor or subcontractor employees in covered contractor workplaces, even if they are not working on a federal contract or contract-like instrument. The workplace safety protocols include:
1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;

2. compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces; and

3. designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

Covered contractors are responsible for ensuring that their employees comply with the workplace safety protocols, as well as the applicable agency COVID-19 workplace safety requirements while in federal workplaces. The Guidance addresses in detail each of the three workplace safety protocols.

1. **Vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation**

Covered contractors must ensure that their employees are fully vaccinated for COVID-19, unless an employee is legally entitled to an accommodation based on a disability, including medical conditions, or a “sincerely held religious belief, practice, or observance.” Documentation that proves vaccination status must be reviewed by the employer, including a copy of any one of the following: the record of immunization from a health care provider or pharmacy; the COVID-19 Vaccination Record Card; medical records documenting the vaccination; immunization records from a public health or State immunization information system; or any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine. A digital copy of the record is sufficient.

Covered contractor employees must be fully vaccinated by December 8, 2021. After that date, all covered contractor employees “must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract.” Federal agencies may approve a 60-day extension, if there is an urgent, mission-critical need for a covered contractor to have its employees begin work on a covered contract or at a covered workplace before becoming fully vaccinated. In such instance the employers must ensure that the unvaccinated employees are wearing masks and meeting physical distancing requirements.

2. **Requirements related to masking and physical distancing while in covered contractor workplaces**

Covered contractors must ensure that all individuals at a covered contractor workplace, including employees and visitors, comply with published CDC guidance for masking and physical distancing applicable to the specific workplace setting, e.g., healthcare, transportation, correctional and detention facilities, and schools.
With limited exceptions, fully vaccinated people must wear a mask in indoor settings in areas where community transmission is “high or substantial,” but not where community transmission is “low or moderate.” Physical distancing is not required for fully vaccinated individuals regardless of level of community transmission. Individuals who are not fully vaccinated must wear a mask indoors and in crowded outdoor settings and during outdoor activities that involve sustained close contact with other people, regardless of the level of community transmission. In addition, to the extent practicable, they must maintain a distance of at least six feet from others at all times, including in offices, conference rooms, and all other communal and work spaces. Individuals required to wear a mask must wear appropriate masks consistently and correctly. Covered contractors must check the CDC COVID-19 Data Tracker County View website weekly for community transmission information.

Accommodations may be required for covered employees who cannot wear a mask due to a disability or because of a sincerely held religious belief, practice, or observance. Exceptions to mask wearing and/or physical distancing requirements consistent with CDC guidelines may be provided for individuals with private offices or for limited time when eating or drinking. Exceptions may also be provided where employees engage in activities in which a mask may get wet; high intensity activities where covered contractor employees are unable to wear a mask because of difficulty breathing; or activities for which wearing a mask would create a risk to workplace health, safety, or job duty as determined by a workplace risk assessment.

3. **Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces**

Covered contractors must designate a person or persons to coordinate the implementation of and compliance with the Guidance and the workplace safety protocols at covered contractor workplaces. The designated individual(s) must ensure that information on required COVID-19 workplace safety protocols, including on protocols and requirements related to masking and physical distancing, is provided to covered contractor employees and all other individuals likely to be present at covered contractor workplaces.

**Frequently Asked Questions**

The Guidance also includes a Frequently Asked Questions (“FAQ”) section, which addresses vaccination and safety protocols, workplaces, scope and applicability, and compliance, which are summarized below.

Key points on vaccination and safety protocols include:

- contractors must post signage at entrances regarding safety protocols for fully and partially vaccinated persons, including masking and physical distancing protocols.
- contractors do not have to provide onsite vaccinations at workplaces.
- contractors must resolve employees’ accommodation requests regardless of an employee’s workplace location.
employees previously infected with COVID-19 must still be vaccinated and may not submit a recent antibody test in lieu of proof of vaccination.

Key points on workplaces include:

- the Guidance applies to all areas of a covered contractor's workplace – whether indoors or outdoors, as well as to employees working remotely;

- unless the covered contractor can determine that no employee in or at one building, site, or facility will come in contact with a covered contractor employee during contract performance, all other buildings, sites, or facilities controlled by a contractor are considered covered contractor workplace;

- workplace safety protocols are the same whether work is performed at the covered contractor workplace or at a federal workplace.

- Notably, the Guidance also applies to remote workers.

The key points on scope, applicability and phase-in requirements of covered contracts are as follows:

- **Contracts awarded prior to October 15, 2021 where performance is ongoing** – the requirements must be incorporated at the point at which an option is exercised or an extension is made;

- **New contracts** – the requirements must be incorporated into contracts awarded on or after November 14, 2021. Between October 15 and November 14, agencies must include the clause in their solicitation; agencies and contractors are encouraged to include the clause in contracts that were solicited before October 15, but are not required to do so.

President Biden’s Order applies to all federal contractors, regardless of size, and to subcontractors at all tiers, except for subcontracts solely for the provision of products. Accordingly, the FAQs take a broad view of covered employees, stating that employees who perform duties necessary to the performance of the covered contract, even if not directly engaged in the specific work identified in the contract (such as human resources, billing, and legal review), perform work “in connection with” a covered contract, and therefore are covered by the Order. The Guidance as updated by the Task Force in the foreseeable future will also apply to existing contracts.

Regarding compliance, the Guidance makes clear that any of the workplace safety protocols set forth in the Guidance supersede any contrary state or local law or ordinance. Further, the Guidance does not excuse noncompliance with any applicable federal, state or municipal mandate establishing more protective workplace safety protocols. In addition, should a covered contractor be subject to the workplace safety requirements promulgated by the Occupational Safety and Health Administration, compliance with the Guidance is still mandated.

As a practical matter, the Guidance essentially requires employers who are federal contractors or subcontractors to be first-line enforcers of federal vaccination mandates, irrespective of the difficulties that role may engender from vaccine-
resistant employees. The ante for being a federal contractor has just been significantly raised.

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