

ALERT

Employment Law & Employee Benefits

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SURPRISE! COVID-19 MANDATES FOR FEDERAL CONTRACTORS & SUBCONTRACTORS: HOW THEY WILL APPLY TO YOU

On September 9, 2021, President Biden signed [Executive Order 14042](#), *Ensuring Adequate COVID Safety Protocols for Federal Contractors* (the “**Order**”). In general, the Order announced that federal contractors and subcontractors would soon be required to abide by workplace safety protocols related to COVID-19. The Order did not specify what those protocols would be, although it was clear that a COVID-19 vaccine mandate would be included. Instead, the Order required the [Safer Federal Workforce Task Force](#) to issue guidance, no later than September 24, 2021, on the following:

- Definitions of relevant terms for contractors and subcontractors;
- Explanations of protocols required of contractors and subcontractors to comply with workplace safety guidance; and
- Any exceptions that apply to contractor and subcontractor workplace locations and individuals in those locations working on or in connection with a Federal Government contract or contract-like instrument.

Right on time, the Safer Federal Workforce Task Force issued its [guidance](#) (the “**Task Force Guidance**”) on September 24, 2021. This Alert summarizes the key information we learned from the Task Force Guidance and the Order.

- **Effective Date.** The Order became effective on September 9, 2021. However, it only applies to the following:
 - Contracts and contract-like instruments entered into or solicited on or after October 15, 2021;
 - Extensions or renewals of existing contracts or contract-like instruments on or after October 15, 2021; and

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- Exercises of options on existing contracts or contract-like instruments on or after October 15, 2021.
- **In General.** Federal contractors and subcontractors with a covered contract will be required to conform to the following workplace safety protocols:
 - COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
 - Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces; and
 - Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.
- **Employers Covered by the Order.**
 - Only “covered contractors” are subject to the requirements of the Order.
 - A prime contractor and its subcontractors at any tier (except for those providing only products) are each a covered contractor, if the contract with the federal government is a “covered contract.”
- **Contracts Covered by the Order.**
 - **Contracts that are Covered Contracts.** “Covered contract” is defined very broadly as “an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law” and includes the following:
 - Mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them;
 - All contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing;
 - Any contract that may be covered under any Federal procurement statute;

- Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so;
 - Awards and notices of awards;
 - Job orders or task letters issued under basic ordering agreements;
 - Letter contracts;
 - Orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance;
 - Exercised contract options;
 - Bilateral contract modifications;
 - Contracts covered by the Service Contract Act;
 - Contracts covered by the Davis-Bacon Act;
 - Concessions contracts not otherwise subject to the Service Contract Act; and
 - Contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public.
- **Exceptions.** The following are expressly excluded from the Order:
- Grants;
 - Contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended;
 - Contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold, as that term is defined in section 2.101 of the Federal Acquisition Regulation; and
 - Subcontracts solely for the provision of products.

- **Clause Must be Included.**
 - Each covered contract must include a clause that “specif[ies] that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance or Guidance), provided that the Director of the Office of Management and Budget (Director) approves the Task Force Guidance and determines that the Guidance, if adhered to by contractors or subcontractors, will promote economy and efficiency in Federal contracting.”
 - The prime contractor must flow the clause down to first-tier subcontractors.
 - High-tier subcontractors must flow the clause down to the next lower-tier subcontractor, to the point at which the subcontract requirements are solely for the provision of products.
- **Vaccination Requirements.**
 - **All Employees Must be Vaccinated, unless Accommodation Required.** Every employee of a covered contractor must be fully vaccinated no later than **December 8, 2021** (or prior to the first day of the performance period of a new covered contract, if later), except for an employee entitled to a disability or religious accommodation.
 - Even part-time employees must be fully vaccinated.
 - Even employees who are not working on or in connection with a covered contractor must be fully vaccinated.
 - Even employees who have had a prior COVID-19 infection must be fully vaccinated.
 - **Fully Vaccinated.** An employee is not fully vaccinated until two weeks after the second dose of a two-dose vaccine (e.g., Pfizer or Moderna) or two weeks after receiving a single-dose vaccine (e.g., Johnson & Johnson). Therefore, to meet the December 8, 2021, deadline, employees must complete their vaccinations ***no later than November 24, 2021.***

- **Documents to Review.**
 - The covered contractor is required to review a paper or digital (e.g., photo, scanned image or PDF) copy of the following documents to ensure its employees' vaccination status:
 - The record of immunization from a health care provider or pharmacy;
 - The COVID-19 Vaccination Record Card (CDC Form MLS-319813_r, published on September 3, 2020);
 - 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.
 - An employee's attestation of vaccination is not an acceptable substitute for documentation of proof of vaccination. If an employee does not have a copy of acceptable documentation, the employee should contact the vaccination site where the vaccine was administered or, if it is closed, the state or local health department.
 - The results of a COVID-19 antibody test are not an acceptable substitute for documentation of proof of vaccination.
- **On-Site Vaccination.** Covered contractors are not required to provide on-site vaccination but should ensure that employees are aware of "convenient opportunities to be vaccinated."
- **Accommodation Requests.**
 - Employees may request accommodation from the vaccination mandate due to a disability or sincerely held religious beliefs.

- The covered contractor is responsible for considering and making decisions about accommodation requests. However, if the federal agency that is party to the covered contract is a joint employer with the covered contractor under the Rehabilitation Act or Title VII of the Civil Rights Act, the federal agency also must be involved with the accommodation request.
- **Masking and Physical Distancing in Covered Contractor Workplace Requirements.**
 - **General Requirement.** Covered contractors must ensure that all individuals – including employees and visitors – comply with published CDC guidance for masking and physical distancing at a covered contractor workplace or federal workplace.
 - **“Covered contractor workplace”**
 - Means a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract.
 - Does not include a covered contractor employee’s residence.
 - **“Federal workplace”** means any place, site, installation, building, room, or facility in which any Federal executive department or agency conducts official business, or is within an executive department or agency’s jurisdiction, custody, or control.
 - **Mask Requirements.**
 - **Non-Fully Vaccinated Individuals.** In a covered contractor workplace or federal workplace, unless an accommodation is required, anyone **not fully vaccinated** must wear a mask:
 - **Indoor Rule.** Indoors while in common areas or shared workspaces (including open floorplan office space, cubicle embankments, and conference rooms); and
 - **Outdoor Rule.** In outdoor settings that are crowded or that involve “sustained close contact” with others who are not fully vaccinated.

- **Fully Vaccinated Individuals.**
 - **General Rule.** The general rule is that fully vaccinated individuals in a covered contractor workplace or federal workplace do not need to wear masks.
 - **Exception for Areas of High or Substantial Community Transmission.** However, if the covered contractor workplace is in an “area of high or substantial community transmission,” fully vaccinated individuals must wear a mask indoors while in common areas or shared workspaces (including open floorplan office space, cubicle embankments, and conference rooms), unless an accommodation is required.
 - Covered contractors must check the [CDC COVID-19 Data Tracker County View website](#) for community transmission information in all areas where they have a covered contractor workplace at least weekly to determine proper workplace safety protocols.
 - When the level of community transmission in the area of a covered contractor workplace is reduced from high or substantial to moderate or low, the level of community transmission must remain at that lower level for at least two consecutive weeks before mask requirements for fully vaccinated individuals can be lifted.
 - **Other Rules.** Also, a federal workplace may have its own mask requirements that must be followed.
- **Accommodation Requests for Masks.**
 - Employees may request accommodation from wearing a mask due to a disability or sincerely held religious beliefs.
 - The covered contractor is responsible for considering and making decisions about accommodation requests. However, if the federal agency that is party to the covered contract is a joint employer with the covered contractor under the Rehabilitation Act or Title VII of the Civil Rights Act, the agency also must be involved with the accommodation request.

▪ **Possible Exceptions to Mask Requirements.**

- In accordance with CDC guidelines, a covered contractor may make exceptions to mask requirements, such as:
 - For a limited time while eating or drinking, if physical distancing is observed;
 - When the individual is engaged in an activity in which a mask might get wet;
 - During high intensity activities when wearing a mask causes difficulty breathing;
 - During activities when wearing a mask would create a risk to workplace health, safety, or job duty as determined by a [workplace risk assessment](#); or
 - When mask must be lowered briefly for identification purposes in compliance with safety and security requirements.
- All exceptions must be approved in writing by a duly authorized representative of the covered contractor.

▪ **Permitted Masks.**

- Any mask that is consistent with CDC requirements as set forth in [Types of Masks and Respirators](#) is permitted, including:
 - Disposable masks;
 - Masks that fit properly (snugly around the nose and chin with no large gaps around the sides of the face);
 - Masks made with breathable fabric (such as cotton);
 - Masks made with tightly woven fabric (i.e., fabrics that do not let light pass through when held up to a light source);
 - Masks with two or three layers;

- Masks with inner filter pockets; and
- Filtering facepiece respirators that are approved by the National Institute for Occupational Safety and Health or consistent with international standards.
- The following are not permissible:
 - Face shields only (without a mask); and
 - Masks with single-layer fabric or thin fabric that does not block light.
- **Physical Distance Requirements.**
 - **Non-Fully Vaccinated Individuals.** To the extent practicable, anyone who is not fully vaccinated in a covered contractor workplace or federal workplace should maintain a distance of at least six feet from others at all times.
 - **Fully Vaccinated Individuals.** Fully vaccinated individuals do not need to physically distance in the covered contractor workplace or federal workplace, unless required to do so by more stringent federal workplace rules.
 - **Possible Exceptions.**
 - In accordance with CDC guidelines, a covered contractor may make exceptions for physical distancing, such as when an individual is alone in an office with floor to ceiling walls and a closed door.
 - All exceptions must be approved in writing by a duly authorized representative of the covered contractor.
- **Designation of COVID-19 Workplace Safety Coordinator.**
 - Each covered contractor must designate one or more persons to coordinate implementation and compliance with the Task Force Guidance.
 - The designated coordinator(s) may also be responsible for implementing additional COVID-19 workplace safety protocols required by local, State, or Federal law, and their responsibilities to coordinate those protocols may comprise some or all of their regular duties.

- The designated coordinator(s) must ensure information on required COVID-19 workplace safety protocols is provided to covered contractor employees and all other individuals likely to be present at covered contractor workplaces.
 - Communication can be by means of:
 - Email;
 - Websites;
 - Memoranda;
 - Flyers; or
 - Other means and posting signage at covered contractor workplaces that sets forth the requirements and workplace safety protocols in the Task Force Guidance in a readily understandable manner.
 - Masking and physical distancing requirements must be communicated to visitors and all other individuals present at covered contractor workplaces.
 - Should post signage at entrances that:
 - Contains information on safety protocols for fully vaccinated and non-fully vaccinated individuals; and
 - Instructs individuals to follow those protocols.
 - May take other reasonable steps, such as:
 - Providing information on workplace safety protocols to visitors before they arrive at a covered contractor workplace; or
 - Requiring all visitors to follow masking and physical distancing protocols for non-fully vaccinated individuals.
- The designated coordinator(s) must ensure that covered contractor employees comply with the requirements in the Task Force Guidance related to the showing or provision of proper vaccination documentation.

- **Updates to Guidance.** The Order sets out a process for the Guidance to be updated, based on changes to CDC COVID-19 guidance and depending on the circumstances of the pandemic and public health conditions. Therefore, the vaccination, masking and physical distancing rules may change in the future.
- **Steps to Take Now.** We recommend that federal contractors and subcontractors begin preparing as soon as possible to comply with the Order. Possible steps to begin taking are the following:
 - Appoint a COVID-19 Workplace Safety Coordinator.
 - Develop a process for reporting vaccination status and ensuring confidentiality of vaccination information, and require all employees to notify the coordinator of their vaccination status.
 - Ensure that employees and managers are aware of the process for requesting accommodations due to disabilities and sincerely held religious beliefs.
 - Prepare communications to employees and visitors regarding the requirements of the Order.
 - Implement a mandatory COVID-19 vaccination policy.

If you have any questions or need help complying with the Order and Guidance (including help with a mandatory vaccination policy), please do not hesitate to contact us.

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