

How Federal Vaccine Mandate Will Affect Gov't Contractors

By **Daniel Kelly** (September 27, 2021, 7:42 PM EDT)

The Safer Federal Workforce Task Force issued on Sept. 24 its guidance for federal contractors and subcontractors[1] as required by President Joe Biden's Sept. 9 executive order on ensuring adequate COVID-19 safety protocols for federal contractors.[2] The guidance was approved by the Office of Management and Budget on the same day.[3]



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The guidance contains three key provisions:

- Mandatory vaccination of covered contractor employees who are not legally entitled to accommodation;
- Masking and physical distancing while in covered contractor workplaces in accordance with Centers for Disease Control and Prevention guidelines; and
- The designation by each covered contractor of a point person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.[4]

The guidance, in the form of a clause, is to be included in a broad set of federal contracts and subcontracts, and a broad variety of contract-like instruments — defined by the guidance — within a matter of weeks. Moreover, it encourages adoption of its requirements in all contracts at every tier.

The guidance adopts the mandates included in the executive order[5] and goes further by requiring a large swath of, if not all, employees of federal contractors — including those having nothing to do with a contract covered by the guidance — to be fully vaccinated against COVID-19 by Dec. 8. This requirement includes employees working on covered contracts from home or in other remote locations.

If your company has an agreement with the U.S. government, here is what you need to know now.

Threshold Questions

What are the applicable contracts?

The guidance refers back to the Sept. 9 federal contractor executive order,[6] which provides that the guidance applies to Federal Acquisition Regulation-based and non-FAR-based contracts and contract-like instruments for:

- Services, construction or a leasehold interest in real property;
- Services covered by the Service Contract Act;
- Concessions contracts; and
- Services for federal employees, their dependents or the general public, in connection with federal property or lands.[7]

The guidance defines a contract or a contract-like instrument to include any agreement between two or more parties that creates obligations recognized by law at all levels, from the prime to the lowest-tier subcontract or subagreement.[8]

These include lease agreements, cooperative agreements, provider agreements, intergovernmental 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." [9]

It also includes job orders or task letters issued under basic ordering agreements, orders (including purchase orders), exercised contract options and bilateral contract modifications.[10]

Neither the federal contractor executive order nor the guidance specifically mentions task orders issued under indefinite-delivery, indefinite-quantity contracts, but the definition is so broad that it is nearly impossible to conclude that such task orders would not be included within the definition.

The guidance, like the federal contractor executive order, provides that it does not apply to agreements whose value is equal to or below the simplified acquisition threshold, currently set at \$250,000 under FAR 2.101.[11] It also notes the exemption for work performed outside the U.S. and its outlying areas.[12]

With regard to agreements for products, the guidance removes one ambiguity with regard to whether contracts for products at the prime and sublevels are excluded — they are[13] — but it adds a new ambiguity both by not defining the term "products," and in referring to this exclusion as contracts for "manufacturing of products." [14]

We strongly suggest comments be directed to the task force requesting a definition of products — is it synonymous with the expansive definition in FAR 2.101? — and confirming that the exclusion applies to the supply of all products whether manufactured by the supplier or purchased by the supplier, including commercial off-the-shelf items and commercial items as defined by FAR 2.101.

It is notable that the guidance strongly encourages agencies to include the clause in the excluded agreements, including agreements below the simplified acquisition threshold and agreements for products.[15] Moreover, the guidance strongly encourages agencies to modify existing agreements to incorporate a clause requiring compliance with the guidance prior to the date upon which the federal contractor executive order requires it.[16]

The strong possibility that agencies will follow this lead means virtually all companies in the federal supply chain should prepare now to adopt the requirements in the guidance or risk losing their businesses.

What is the timeline?

The guidance directs the Federal Acquisition Regulatory Council to develop a clause adopting the guidance by Oct. 8, and to recommend agencies engage in class deviations to allow for inclusion of the clause by Oct. 15 in all new FAR-based solicitations for contracts covered by the federal contractor executive order, guidance issued on or after Oct. 15 and all new covered contracts awarded on or after Nov. 14.[17]

The guidance anticipates that the class deviations will be replaced by a FAR clause promulgated through the rulemaking procedure in due course.[18] Agencies responsible for contracts and contract-like instruments covered by the federal contractor executive order that are not under the umbrella of the FAR must develop appropriate guidance — presumably a clause or instructions — by Oct. 8, to incorporate the guidance into the covered instruments entered into on or after Oct. 15.[19]

Beginning Oct. 15, all existing agreements must incorporate the clause at the point where an option is exercised or an extension is made.[20]

Can the FAR Council or the individual agencies deviate from or add additional language, such as definitions, to the clauses they develop?

It doesn't appear so.

In describing the federal contractor executive order, the guidance provides that the clause that will be included in the applicable agreements "shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance" published by the task force, provided it is approved by the OMB.[21] Covered contractors are directed to adhere to the requirements of the guidance.[22]

Addressing "consistent application of the [federal contractor executive order's] requirements across agencies," the guidance provides that the FAR Council will amend the FAR to include a clause that requires covered contractors to comply with the guidance.[23] For non-FAR-based contracts, the language is less clear, directing responsible agencies to develop appropriate guidance that incorporates the requirements into the covered agreements.[24]

If the requirements of the guidance are amended, changed, modified or rescinded, it will be done by the OMB and the task force "as warranted by the circumstances of the pandemic and public health conditions." [25] Moreover, the guidance can be amended to include new guidance issued by the task force — when approved by the OMB — by which contractors subject to the clause will be bound.[26]

That suggests that the clause will merely direct contractors to the guidance itself rather than attempt to encapsulate the requirements of the guidance, as they are susceptible to change.

What about subcontractors?

As stated, the guidance defines covered contracts as all contracts "and any subcontracts of any tier thereunder." [27] The guidance explicitly states that "the requirements apply to subcontractors at all tiers, except for subcontracts solely for the provision of products." [28]

Each contractor in the supply chain must flow down the clause to the lower-tier subcontractor "to the point at which subcontract requirements are solely for the provision of products." [29] If the subcontract

is for products and service, e.g., maintenance, the guidance — echoing the federal contractor executive order — requires that the clause be included in the contract.

The terms "subcontract" and "subcontractor" are not defined; however, a reasonable reading of the guidance suggests that subcontract is intended to be read as broadly as the definition of contract. This means that it includes lease agreements, licenses, permits, letter contracts, purchase orders, exercised contract options and bilateral contract modifications.

This broad reading would be essentially equivalent to the definitions of subcontract — referring back to the definition of contract in FAR 2.101 — and subcontractor — referencing suppliers, distributors and vendors — in FAR 44.101.

3 Key Provisions

1. Covered contractor employees must be fully vaccinated no later than Dec. 8 unless they are legally entitled to accommodation.

What is a covered contractor employee?

A covered contractor employee may include all or a significant portion of the contractor's workforce. Here's why.

Under the guidance, a covered contractor employee is any full-time or part-time employee (1) "working on or in connection with a covered contract; or (2) working at a covered contractor workplace." [30]

With regard to working on or in connection with a covered contract, the guidance defines "in connection with" as employees "who perform duties necessary to the performance of the covered contract, but who are not directly engaged in performing the specific work called for by the covered contract." [31]

The guidance specifically gives as examples the following back-office functions: human resources, billing and legal review. [32] The guidance does not mention management per se, but a reasonable interpretation of the definition would include any person with oversight authority of one or more of the covered contracts.

With regard to working at a covered contractor workplace, the guidance makes clear that the vaccination requirement will include employees of covered contractors who have nothing to do with the covered contract. If an employee is working at a location controlled by a covered contractor at which any employee working on or in connection with a contract covered by the guidance is "likely to be present during the period of performance," that employee is subject to the vaccination requirement. [33]

The guidance provides that it applies to workplace locations that are outdoors as well as indoors. [34]

Further, it makes no difference if all the employees working on or in connection with a covered contract are working in a separate area of the site or the building, unless the contractor can affirmatively demonstrate there is no interaction with other employees, "including interaction through use of common areas such as lobbies, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages." [35]

Although bathrooms are not mentioned, no doubt they apply as well.

The guidance carves out an employee's residence from a covered contractor workplace; however, the guidance makes clear that employees working on or in connection with a covered contract who are working remotely — e.g., at their residence — are subject to the vaccination requirement.[36]

Accordingly, following this through, a person working at home for a covered contractor who has nothing to do with a covered contract is not subject to the vaccination requirement even though someone else working remotely at the same residence — e.g., a spouse, child, etc. — who is working on or in connection with a covered contract must be vaccinated.

Finally, in addition to the mandatory flow-down requirements, covered contractors are encouraged to include the clause in noncovered contracts and agreements with third parties who do not work on or in connection with federal contracts but who are required to be on-site at covered contractor workplaces.[37] Examples given by the guidance are those providing food services, security and grounds-keeping services.[38]

Let's look at an example of the breadth of this requirement.

WeCleanUp Corp., or WC, has a services contract to receive, clean and refurbish equipment utilized by the National Institutes of Health laboratories at WC's facilities in Baltimore, Maryland. The NIH elects to modify the contract to include the clause on Oct. 15. There are five employees performing and supervising the cleaning. They all are located on the fourth floor of one building on a campus made up of three buildings.

The bookkeeper invoicing for the contract is located on the second floor of a building leased by WC in Washington, D.C. WC's in-house counsel reviewing and negotiating the prime contract and subcontracts works remotely at home. The chief operating officer of WC, who has ultimate supervisory authority over the NIH contract, works at WC's world headquarters in Des Moines, Iowa, in the penthouse suite on the 12th floor.

So who at WC must be fully vaccinated by Dec. 8?

- The five employees working on the contract in the building on the Baltimore campus;
- All the employees who work at the Baltimore campus (all three buildings) who may encounter the employees working on the contract in any common area;
- The bookkeeper in the Washington, D.C., building;
- All the employees who work in the Washington, D.C., building who may encounter the bookkeeper in any common area;
- The in-house lawyer working from home, but not anyone else in her residence;
- The COO who has oversight authority in the Des Moines headquarters;
- All the employees who work in the Des Moines headquarters who may encounter the COO in any common area; and

- All third-party contractors, including food service providers, groundskeepers, security guards, janitors and maintenance personnel, who may encounter any of the aforementioned employees at any of the WC sites (not required but strongly encouraged).

The example demonstrates that although WC has only five employees actually working on its one covered contract, the clause may require the company to comply with the vaccination and other requirements for many more employees — possibly numbering in the hundreds or thousands.

The guidance makes clear that any company in the federal supply chain must confront the vaccination requirements for all its employees and its on-site, third-party site contractors.

Is Dec. 8 a firm date?

Yes. However, if an agency has an urgent, mission-critical need for a covered contractor to have an employee begin work on a covered contract or at a covered workplace before the employee becomes fully vaccinated, the head of the agency can approve an exception. The approval is contingent on the employee becoming vaccinated within 60 days of beginning work. Such employee must comply with the masking and distancing requirements for individuals who are not fully vaccinated, prescribed in the guidelines.[39]

What does fully vaccinated mean, and how does a company determine whether an employee is fully vaccinated?

Covered contractor employees must be fully vaccinated by Dec. 8.[40] The guidance provides that an employee is considered fully vaccinated "two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single dose vaccine." [41]

The vaccine must be one approved by either the U.S. Food and Drug Administration or the World Health Organization. These include the Pfizer-BioNTech, Moderna, Johnson & Johnson and AstraZeneca/Oxford vaccines.

According to CDC guidelines, the second shot for the Pfizer vaccine must be taken three weeks after the first. The second shot for the Moderna vaccine must be taken four weeks after the first. The CDC guidelines say one should not get the second dose early. That means in order for an unvaccinated employee to be fully vaccinated by Dec. 8, the employee must take the first Moderna shot by Oct. 27 and the first Pfizer shot by Nov. 3.

Companies subject to these requirements must review employee documentation to prove vaccination status. Acceptable proof consists of (1) a record of immunization from a health care provider or a pharmacy; (2) the COVID-19 vaccination record card — CDC Form MLS-319813_r; (3) medical records documenting the vaccination; (4) immunization records from a public health or state immunization system; or (5) any other official documentation verifying vaccination which includes the vaccine name, date of administration and name of the entity administering the vaccine.[42]

Employees may use hard copies or digital copies — including a digital photograph, scanned image or PDF.[43] An attestation — i.e., a notarized affidavit or declaration under the pains and penalties of perjury — of vaccination by an employee is not sufficient. If the employee has lost or does not have the vaccination documentation, it is incumbent on the employee to get it.[44]

The guidance makes clear that a prior COVID-19 infection or an antibody test allegedly demonstrating vaccination or immunity is no substitute for vaccination.[45]

The guidance requires contractors to make employees aware of convenient opportunities to be vaccinated.[46] Contractors can but are not required to provide vaccinations at their workplaces.[47] The guidance does not address whether the costs associated with vaccination — lost labor, for example — are allowable, whether such costs are direct or indirect, and if direct, whether fixed-price contracts or ceilings of cost-type contracts may be increased by modification to pay for such costs.

How does a covered contractor know whether an accommodation should be given to an employee who does not wish to be vaccinated?

This is where it gets murky and further guidance from the task force will be essential. The guidance recognizes that a contractor may be required to provide an accommodation to employees who advise their employer that they are not vaccinated because of (1) a disability, which could include medical conditions; or (2) a "sincerely held religious belief, practice or observance." [48]

Contractors are told to review and consider what, if any, accommodation they must offer.[49] The guidance makes clear that the contractor is responsible for considering and dispositioning requests for accommodation.[50]

There is no other guidance on this matter. However, the use of "disability" and "sincerely held religious belief, practice or observance," are identical to terms of art used in the 1990 Americans with Disabilities Act and Title VII of the Civil Rights Act with regard to religious accommodations.

Contractors facing requests for accommodation can and should be guided by the vast body of case law, regulation and policy guidelines, both state and federal, that has developed since the enactment of these two landmark statutes.

2. Covered contractors must ensure all covered contractor employees and visitors comply with CDC guidance for masking and physical distancing at the covered contractor workplace.

Evident from the CDC web page, the agency has not published a uniform and user-friendly set of guidelines on masking and physical distancing in a workplace environment.[51] This perhaps explains why the guidance sets out such requirements rather than simply referring the reader to CDC guidelines.

Here is a summary.[52]

- In areas of high or substantial community transmission, fully vaccinated people must wear a mask in indoor settings, with limited exceptions.
- Fully vaccinated people do not need to physically distance.
- Individuals who are not fully vaccinated must wear a mask indoors and in certain outdoor settings, with limited exceptions.
- Individuals who are not fully vaccinated should maintain a distance of at least six feet from others at all times.

- Exceptions to mask wear include:
 - The employee is alone in closed office space.
 - The employee is eating or drinking and maintaining an appropriate distance.
 - The employee is in situations where the mask will get wet.
 - The employee is engaged in high-intensity activities where wearing a mask makes breathing difficult.
 - Wearing a mask would create a risk to workplace health, safety, or job duty as determined by a workplace assessment.

With regard to visitors, the guidance requires contractors to post signage at their workplaces providing information on the safety protocols for fully vaccinated and not fully vaccinated individuals.[53] Contractors must instruct individuals to follow the appropriate protocols while at the workplace.[54]

The guidance provides no instructions on how a contractor is to determine a visitor's vaccination status or, as discussed below, whether a visitor should be subject to accommodation with regard to masking requirements.

Similar to the vaccination requirements, the guidance provides that the contractor may be required to provide accommodation to employees who state they cannot wear a mask because of a disability or because of a sincerely held religious belief, practice or observance.[55] Employers are again left on their own to navigate federal and state laws to determine how such a request must be accommodated.

3. Covered contractors must designate a person to coordinate compliance with the guidance at covered contractor workplaces.

The designated person must communicate all the required workplace safety protocols in a readily understandable manner by posting signage, engaging in written communications via email, posting on websites, and/or distributing memoranda or flyers.[56] The designated person is obligated to ensure that employees comply with the requirement to provide proper vaccination documentation.[57]

Conclusion

In a mere few weeks, a vast number of companies in the government supply chain will be subject to these vaccination and workplace protocol requirements. It is folly to delay action until the clause is released, as it will simply direct contractors to comply with the guidance. Moreover, due to the strong-encouragement language, it is likely that agencies will begin modifying all their existing contracts, even excluded contracts, to include the clause.

Accordingly, senior managers together with human resources personnel should be planning how to:

- Determine the vaccination status of employees and visitors to the workplace;
- Aid employees in locations where the guidance may not apply with obtaining required vaccine obtain doses within the narrow time frame;

- Meet the Dec. 8 deadline — including paid time off and directions to facilities offering vaccinations;
- Determine whether to permit an exemption to the vaccination requirement due to a disability or a religious objection; and
- Determine disciplinary measures for employees who refuse to cooperate by being vaccinated, or adhering to masking and social distancing protocols;

Finally, note that there is no safe harbor accounting for states or municipalities that have laws prohibiting mandatory vaccinations or masking and distancing requirements. The guidance is promulgated pursuant to federal law and supersedes any contrary state or local law or ordinance.[58] Moreover, employees are still bound by any applicable state or municipal law or ordinance that imposes stricter requirements on the workplace or workforce.[59]

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[1] The Safer Federal Workforce Task Force COVID-19 Workplace Safety: guidance for Federal Contractors and Subcontractors (Sept. 24, 2021) (available at https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf).

[2] Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors (No. 14042) (Sept. 9, 2021) (available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>).

[3] Office of Management and Budget, Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order 14042 (Sept. 2, 2021) (available at <https://public-inspection.federalregister.gov/2021-21184.pdf>).

[4] guidance, Introduction, p. 1.

[5] See, <https://www.governmentcontractslaw.com/2021/09/whats-next-for-federal-contractors-and-mandatory-covid-19-safety-protocols/>.

[6] Id., Definition of "Covered contract" at p. 3.

[7] federal contractor executive order, Section 5(a).

[8] guidance, Definitions at p. 3.

[9] Id.

[10] Id.

[11] Id. at p. 5.

[12] Id., Answer to Question 18, p. 13.

[13] Id. at p. 5.

[14] Id.

[15] Id.

[16] Id.

[17] Id., Answer to Question 16, pp. 12-13.

[18] Id.

[19] Id.

[20] Id.

[21] Id., Introduction, p. 1.

[22] Id. at p. 2.

[23] Id., Answer to Question 15, p. 12.

[24] Id.

[25] Id., Introduction, p. 2.

[26] Id., Answer to Question 16, p. 12.

[27] Id., Definitions, p. 3.

[28] Id., Answer to Question 13, p. 12.

[29] Id.

[30] Id., Definitions, pp. 3-4.

[31] Id., Answer to Question 17, p. 13.

[32] Id.

[33] Id., Definitions ("Covered contractor workplace") at p. 4.

[34] Id., Answer to Question 7, p. 10.

[35] Id., Answers to Questions 8 and 9, pp. 10-11.

[36] Id., Answer to Question 11, p. 11.

[37] Id., Section 1, p. 6.

[38] Id.

[39] Id., Section 1, p. 5.

[40] Id., Section 1, p. 5.

[41] Id., Definitions ("Fully vaccinated"), p. 4.

[42] Id., Section 1, pp. 5-6.

[43] Id.

[44] Id., Answer to Question 3, p. 9.

[45] Id., Answer to Questions 5 and 6, p. 10.

[46] Id., Answer to Question 2, p. 9.

[47] Id.

[48] Id., Section 1, p. 5.

[49] Id.

[50] Id., Answer to Question 4, p. 10.

[51] CDC guidance for COVID-19 (updated March 15, 2021) (available at <https://www.cdc.gov/coronavirus/2019-ncov/communication/guidance.html>).

[52] See guidance, Section 2, pp. 6-7.

[53] Id., Answer to Question 1, p. 9.

[54] Id.

[55] Id., Section 2, p. 7.

[56] Id., Section 3, p. 8.

[57] Id.

[58] Id., Answer to Question 19, p. 13.

[59] Id.