

COVID-19

TASK FORCE ISSUES VACCINE GUIDANCE FOR FEDERAL CONTRACTORS

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By: Morgan E. Geffre and Charles E. McClellan

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As President Biden announced under his COVID-19 Action Plan, the Safer Federal Workforce Task Force issued its Guidance for Federal Contractors and Subcontractors on September 24. The guidance has already been approved by the Office of Management and Budget.

President Biden's executive order required certain government contracts to include a clause stating that the contractor and any subcontractors (at any tier) must, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force and approved by the Office of Management and Budget (the "COVID clause"). Below is a summary of the scope and implementation of the Safer Federal Workforce Task Force's guidance:

SCOPE

President Biden's Executive Order applies to all procurement contracts or contract-like instruments: (1) for services, construction, or a leasehold interest in real property; (2) for services covered by the Service Contract Act; (3) for concessions; (4) for the provision of services on Federal property for Federal employees, their dependents, or the general public ("covered contracts"). Notably, this definition does not cover contracts solely for the provision of products. The Executive Order further exempts, among others, subcontracts of covered contracts that are solely for the provision of products, as well as federal government grants.

Under the Task Force guidance, the COVID clause must be included in solicitations for covered contracts after October 15, 2021, and in all new covered contracts issued after November 14. For existing covered contracts, the COVID clause must be incorporated whenever a contractual option is exercised or an extension is made. Importantly, the prime contractor must flow the COVID clause down to first-tier subcontractors, and higher-tier subcontractors must flow the COVID clause down to their subcontractors, except where the subcontract is solely for

the provision of products.

The Task Force guidance also defines which persons are covered by the government mandates. Compliance is required for a wide range of employees who perform work “in connection” with a covered contract, including employees who are not directly engaged in performing the specific work required under the covered contract, such as human resources, billing, and legal services. This includes remote employees (including those working from home) who provide services in connection with the contract. The mandate also applies to all employees and visitors in covered contractor workplaces, regardless of whether the employee is involved with the government program. The guidance defines “covered contractor workplace” broadly to cover any location (other than a remote employee’s residence) where any employee working on or in connection with a covered contract is likely to be present during the entire period of performance; however, the covered contractor workplace may be limited to a specific building, floor, or other area within a location, but only if the covered contractor affirmatively determines that none of its employees outside the designated area will come into contact with the covered employee, including interactions in common areas such as lobbies, security clearance areas, meeting rooms, or parking garages.

REQUIREMENTS

Covered federal contractors and subcontractors must conform to the following safety protocols prescribed in the current Task Force guidance:

1. COVID-19 vaccination of every covered contractor employee, 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.

Vaccination Requirements

All contractor employees must be fully vaccinated by December 8, 2021, or prior to the first day of performance on a newly awarded contract. There is no exception for employees with a prior COVID-19 infection or recent antibody test, but there are exceptions to accommodate disabilities and sincerely held religious beliefs. Employees are required to ensure compliance by obtaining documented proof of vaccination from each employee; an attestation of vaccination by the employee is not an acceptable method of proof. Federal contractors are not required to provide employees onsite vaccination options.

Masking and physical distancing requirements

Covered contractors and subcontractors are required to ensure that all individuals—including employees and visitors—comply with masking and social distancing requirements. The requirements differ for vaccinated versus unvaccinated persons.

Vaccinated persons are not required to physically distance, but must wear a mask indoors in locations where there is high or substantial community transmission as set forth in the CDC COVID-19 Data Tracker County View. Contractors must review community transmission data weekly and adopt more protective workplace safety protocols when local transmission rates are high or substantial.

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Unvaccinated persons at all times must wear masks indoors and outdoors, regardless of community transmission rates, and, to the extent practicable, must maintain six feet of social distance. The current guidance does not require contractors to obtain proof of vaccination from visitors. Contractors are expected to post the protocols at entrances and instruct visitors to comply with those protocols while at a covered contractor workplace. Contractors also may take other reasonable steps to ensure compliance, such as by communicating the protocols to visitors prior to their arrival or imposing the masking and social-distancing obligations on all visitors, regardless of vaccination status.

Designation of a COVID-19 Safety Coordinator

Covered contractors and subcontractors must designate a person to coordinate and implement the Task Force guidance. The designated individual is responsible for ensuring compliance with the vaccine mandate and ensuring that the contractor's safety protocols are clearly communicated to and posted for employees and visitors. The contractor is not required to create a new Safety Coordinator position, and these responsibilities can be assigned to a current employee who has other roles or responsibilities.

NEXT STEPS

Federal government contractors should take steps now to evaluate whether they have any covered contracts or subcontracts and, if so, to determine which locations would constitute a covered contractor worksite. While this mandate kicks in only on new, modified, or extended contracts going forward, covered contractors should begin preparing for compliance now (although there undoubtedly will be many legal challenges to the Executive Order and the Task Force's guidance in the meantime).

FOR MORE INFORMATION

If you have questions or want more information regarding vaccine guidance for federal contractors, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. For more information, contact **Morgan Geffre** at 316.291.9577 or mgeffre@foulston.com or **Charles McClellan** at 316.291.9764 or cmcclellan@foulston.com. For more information on the firm, please visit our website at www.foulston.com.

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