

ALERT

Task Force Guidance Sets Out Broad Reach of EO 14042's Requirements for Contractor Employee Vaccinations

September 27, 2021

WHAT: As required by Executive Order (EO) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors—previously covered here—the Safer Federal Workforce Task Force issued guidance for federal contractors on COVID-19 workplace safety, titled “COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors.” The Guidance most notably provides definitions for certain terms in EO 14042 and adds details on compliance with some of the EO’s requirements, which the administration plans to begin incorporating into prime contracts by the middle of October. These requirements will include, as expected, requirements for covered employees to be vaccinated against COVID-19.

WHEN: The Task Force issued the Guidance on September 24, 2021. The key date newly added by the Guidance is that employees covered by EO 14042 must be fully vaccinated starting on December 8, 2021.

WHAT DOES IT MEAN FOR INDUSTRY: Contractors should take note of key aspects of the Guidance while continuing to plan for compliance with contracts incorporating EO 14042’s obligations. In particular, the Guidance defines employees who must be vaccinated as including not just those working on or in connection with covered contracts (which was specified in the EO’s text) but also many employees co-located with those individuals. The Guidance also applies the vaccination requirement to many employees who work remotely, even if they never come to the office. Contractors should assess their plans to review vaccination status of various employee groups and determine if they warrant expansion or other revisions to

Authors

Craig Smith
Partner
202.719.7297
csmith@wiley.law

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help ensure compliance by December 8.

KEY PROVISIONS: The Task Force organized the Guidance into three main sections: (1) Vaccination of Covered Contractor Employees; (2) Masking and Physical Distancing; and (3) Designation of a Coordination Point Person.

As contractors consider how the EO 14042 obligations might apply to them, they should be aware of the administration's encouraging agencies and higher-tier contractors to incorporate these obligations into contracts that the EO had excluded from its own coverage, such as contracts and subcontracts for products as well as unrelated commercial contracts awarded by covered contractors (such as food services and onsite security). That encouragement injects uncertainty into planning for these contractors.

Vaccinations: Which Employees

The Guidance's definition of "covered contractor employees" is perhaps most salient for assessing who will be subject to the vaccination requirements. As expected, covered employees include those who work "on or in connection with" a covered contract or subcontract. But the Guidance also extends coverage to employees who work at a "covered contractor workplace," which is 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."

For many contractors, this latter group of employees who work at "covered contractor workplaces" may significantly expand the scope of employees subject to the vaccination requirements. This is all the more so because the requirements extend to all contractor employees at a given building, facility, or campus controlled by the contractor, unless the contractor can affirmatively determine that certain employee populations will not intermingle with employees working on or in connection with covered contracts in hallways, elevators, parking lots, security checkpoints, and similar areas. Contractors planning for these requirements should thus consider not only the contracts and subcontracts likely to be covered, but also the physical locations where employees work on or in connection with those contracts/subcontracts—and who else from the contractors' organizations work at those locations.

Remote workers and workers performing outdoors are also subject to vaccination requirements if they work "on or in connection with" covered contracts, even if they are working in locations separate from where covered employees perform the federal contract work. Contractors should consider how these requirements affect not just remote workers performing directly on contracts, but also back-office type personnel who support those contracts in billing, legal, HR, and related functions, especially as industries trend towards increasing use of remote workers.

The Guidance provides that employees may receive religious or disability accommodations. The Guidance tasks contractors with dispositioning these requests, to which contractors can likely apply their existing policies and practices for employee accommodation requests. For any nuances specific to this current environment, contractors should consider consulting with their employment counsel.

Vaccinations: Timing

The Guidance states that covered contractor employees must be fully vaccinated by December 8, 2021. Full vaccination means two weeks past the last/only shot, depending on the vaccine type. Thus for employees expected to be covered starting right on December 8, those individuals should have their last/only shot before Thanksgiving.

Many contractor employees might not become covered until after December 8, however, because the contracts that they (or colleagues they are co-located with) work on or in connection with will not incorporate these obligations until later in December 2021 or else in 2022 and beyond. In those scenarios, 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 EO 14024 clause has been incorporated into the covered contract.

The Guidance anticipates that agencies may have urgent needs for a covered contractor's services before its covered employees are fully vaccinated. In these situations, the Guidance provides for an agency head to approve an exception to these requirements that defers the deadline for covered employees' full vaccinations to within 60 days of beginning work.

Vaccinations: Documentation

The Guidance requires covered contractors to review their employee vaccination documents and requires covered employees to submit one of several types of vaccination documents, such as a COVID-19 Vaccination Record Card (U.S. Centers for Disease Control [CDC] Form MLS-319813_r, published on September 3, 2020). The Guidance provides that the employers can accept digital copies of any of the records to satisfy their obligations. Employees' own attestations of having been vaccinated are not sufficient, per the Guidance.

Masking and Distancing

The Guidance also calls for contractors to ensure that their employees, and visitors, comply with CDC guidance for masking and physical distancing at the contractors' covered workplaces. Again, the Guidance acknowledges that a covered contractor may have to provide an accommodation for employees who cannot wear a mask due to religion or a disability.

Coordination

The Guidance requires covered contractors to designate one or more persons to coordinate implementation of and compliance with the Guidance's protocols. These obligations include ensuring covered contractor employees understand the requirements and are fully vaccinated.

OPEN ISSUES: While the Guidance clearly requires vaccinations and provides a definition of which employees are covered, many questions remain unanswered. One is whether and how contracting agencies will reimburse contractors for costs incurred to implement these requirements. While the vaccine itself is provided free for many Americans, and the Guidance states that contractors need not offer vaccinations on-site, other

vaccine-related costs (such as time off for vaccination or for side effects or costs related to accommodations) can add up. Even if the administration provides further written guidance, the practicalities of whether those costs will ultimately be reimbursed is unknown at this point.

Also an open question is whether forthcoming contract clauses will expand on prime contractors' obligations regarding their subcontractors. One of the Guidance's Q&As states that it is the obligation of the prime contractor to flow down the required clause, indicating that the obligation for ensuring subcontractor compliance rests with the subcontractors. It remains to be seen whether contracting agencies will adhere to that bright-line division of responsibility.

There are also privacy concerns that are not addressed by the Guidance. Questions might arise as to whether particular employees are vaccinated, which may put contractors in a position of potentially sharing proof of employees' vaccinations with contracting agencies, higher-tier contractors, or other third parties. Although an employee may consent to sharing that information directly, when the employer becomes the intermediary, privacy laws can be implicated. The same goes for information about employees' religious or disability-related accommodations: although employees can choose to share their need for an accommodation with their employer, the employer cannot then share that information with a third party without employee consent. Practically, how an employer will prove compliance to an agency without violating provisions of the Americans with Disabilities Act (ADA)—i.e. the ADA's prohibition on disclosing employee personal health information—is not entirely clear because the Guidance is not entirely clear on how compliance will be regulated.

Another area for uncertainty is interactions with state or local laws (or ordinances, etc.) that impose contrary obligations. The Guidance states expressly that the requirements of EO 14042, undertaken under federal law, supersede all contrary state and local requirements. When and how the Government takes that position up with state/local governments of course remains to be seen and will inevitably place contractors in difficult situations.

A final (for this alert) unanswered question is how often, and to what extent, the Task Force will revise the Guidance. Because contractors will be required to comply with a clause that in turn requires the contractors to comply with the Guidance, which can itself change at any point with or without warning, contractors may at times feel that compliance obligations are a moving target.

Regardless, contractors should continue preparing to come into compliance even with the open questions remaining. The definition of covered contractor is expansive – going beyond just workplaces where the federal work is being performed. Contractors should be prepared to receive questions from employees regarding documentation and consider how to address any populations of employees that are not vaccinated and appear likely to become “covered contractor employees” in the coming months. Contractors must also be mindful that certain employees will be submitting reasons for exemption and accommodation requests. Contractors should be equipped to make those determinations and accommodations in time to be compliant by the vaccination deadline.

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