



October 7, 2021

COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors

On September 9, President Biden signed Executive Order 14042, “Ensuring Adequate COVID Safety Protocols for Federal Contractors” (the “Order”), to ensure that federal contractors provide adequate COVID-19 safeguards to their workers.ⁱ The Order directs executive departments and agencies to include a clause (the “Clause”) in covered contracts and contract-like instrumentsⁱⁱ specifying that the contractor shall, for the duration of the contract, comply with all guidance (the “Guidance”) for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (the “Task Force”) upon approval by the Director of the Office of Management and Budget (the “Director”). The Order also requires the contractor and all subcontractors to incorporate the Clause into all lower-tier subcontracts. On September 24, the Task Force issued the Guidance, and on September 28, the Director published the required approval of the Guidance.ⁱⁱⁱ On September 30, 2021, the FAR Council issued a memo^{iv} to executive departments and agencies with the specific language of the Clause that should be included in solicitations and contracts.

The Guidance requires “Covered Contractors” to ensure that “Covered Contractor Employees” comply with certain workplace safety protocols to decrease the spread of COVID-19. These protocols include requirements on vaccination, masking and physical distancing. Notably, the Guidance applies to all “Covered Contractor Employees”, including (i) remote workers and (ii) employees in “Covered Contractor Workplaces” even if they are not working on a federal government contract. Definitions are set forth below. The following summarizes the requirements under the Guidance:

Application Of COVID-19 Guidance

<p>What are the new workplace safety protocols under the Guidance?</p>	<ol style="list-style-type: none"> 1. COVID-19 vaccination of Covered Contractor Employees, except 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 to coordinate COVID-19 workplace safety efforts at Covered Contractor Workplaces.
<p>What is a “Covered Contract”?</p>	<p>A “Covered Contract” is any contract or contract-like instrument that contains the Clause required by the Order, <i>i.e.</i> the requirement that the contractor/subcontractor comply with all guidance published by the Task Force and approved by the Director.</p>



Guidance for Federal Contractors and Subcontractors

Page 2

<p>Which federal contracts are required to contain the Clause?</p>	<p>The Order requires that the Clause be included in any new contract or contract-like instrument, new solicitation for a contract or contract-like instrument, extension or renewal, and exercise of an option <u>if it is a procurement contract or contract-like instrument for services or construction.</u>^v</p> <p>The Order does not apply to:</p> <ul style="list-style-type: none">• Grants;• Contracts or subcontracts of \$250,000 or less, with certain exceptions; or• Subcontracts solely for the provision of products. <p>The Guidance provides a detailed (though somewhat tricky) definition of the types of contracts and contract-like instruments that are covered by the Order.</p> <p>The Guidance also “strongly encourages” agencies to incorporate a clause requiring compliance with the Guidance into existing contracts and contract-like instruments that don’t meet the above threshold.</p>
<p>What does the Clause say?</p>	<p>Compliance. The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, <u>as amended during the performance of this contract</u>, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at https://www.saferfederalworkforce.gov/contractors/</p> <p>Subcontracts. The Contractor shall include the substance of this clause, including this paragraph, in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.</p>
<p>When will the Clause be required to be included in federal contracts?</p>	<p>The Guidance lays out the following phase-in of the requirements:</p> <ul style="list-style-type: none">• <i>Existing Contracts</i> – the Clause must be incorporated when an option is exercised or an extension/renewal is made on or after October 15.• <i>New contracts</i> –



Guidance for Federal Contractors and Subcontractors

Page 3

	<ul style="list-style-type: none">○ Between October 15 and November 14, agencies must include the Clause in their solicitations.○ Between October 15 and November 14, agencies are encouraged to include the Clause in contracts awarded but are not required to do so unless the solicitation for such contract was issued on or after October 15.○ On or after November 14, the Clause must be incorporated into new contracts. <p>Note: There are additional steps that are necessary at the federal level to actually implement the Order’s requirements.</p>
<p>Who is a “Covered Contractor” that must ensure these protocols are followed?</p>	<p>A “Covered Contractor” is a prime contractor or subcontractor at any tier who is a party to a Covered Contract.</p> <p>Contractors, including subcontractors, must “flow down” the Order’s requirements to the next lower-tier subcontractors, except for subcontracts solely for the provision of products. The Task Force’s Frequently Asked Questions states that a prime contractor may assume a subcontractor is complying with the Clause unless the prime contractor has credible evidence otherwise.</p> <p>The Guidance applies equally to Covered Contractors regardless of their size.</p>
<p>Who is a “Covered Contractor Employee” that must follow these protocols?</p>	<p>“Covered Contractor Employees” include full-time or part-time employees working on or in connection with a Covered Contract or working at a “Covered Contractor Workplace” (see below).</p> <p>Work “in connection” with a Covered Contract includes employees who perform duties necessary to the performance, but not directly engaged in performing the specific work called for by the Covered Contract, including human resources, billing and legal review.</p> <p>Notably, the Guidance confirms: “This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.” Thus, employees who are working in a Covered Contractor Workplace are included, even if they are not working on or in connection with a federal contract.</p>



Guidance for Federal Contractors and Subcontractors

<p>What is a “Covered Contractor Workplace” where these protocols must be in place?</p>	<p>A location controlled by a Covered Contractor at which any employee working on or in connection with a Covered Contract is likely to be present during the period of performance of the contract.</p> <p>The Guidance applies to workplace locations that are outdoors.</p>
<p>If the Covered Contractor Employee works on another floor, or in a separate area or building, do other areas or buildings controlled by a Covered Contractor constitute a Covered Contractor Workplace?</p>	<p>Yes, unless a Covered Contractor can affirmatively determine that none of its employees on another floor, in separate areas of the building, or in another building will come into contact with a Covered Contractor Employee during the period of performance of a Covered Contract.</p> <p>This would include affirmatively determining that there will be no interactions between Covered Contractor Employees and non-covered contractor employees in those locations during the period of performance on a Covered Contract, including interactions through use of common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.</p>

COVID-19 Vaccination Requirement

<p>What is the COVID-19 vaccination requirement under the Guidance?</p>	<p>Covered Contractors must ensure that all Covered Contractor Employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation. <u>Covered Contractor Employees must be fully vaccinated no later than December 8, 2021.</u></p> <p>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 or an exercised option or extended or renewed contract when the Clause has been incorporated into the Covered Contract.</p> <p>Notably, the Guidance addresses two frequently asked questions:</p> <ul style="list-style-type: none"> • Covered Contractor Employees who have had a prior COVID-19 infection <u>are</u> required to be vaccinated. • A Covered Contractor cannot accept a recent antibody test from a Covered Contractor Employee to prove vaccination status.
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Guidance for Federal Contractors and Subcontractors

Page 5

<p>Do Covered Contractors need to provide onsite COVID-19 vaccinations to their employees?</p>	<p>No, but Covered Contractors should ensure their employees are aware of convenient opportunities to be vaccinated.</p>
<p>Are there exceptions to the COVID-19 vaccination requirement?</p>	<p>Yes. A Covered Contractor may be required to provide an accommodation to Covered Contractor Employees who are not vaccinated against COVID-19 because of a disability or a sincerely held religious believe, practice or observance.</p> <p>Under certain urgent circumstances, Federal agencies may approve a 60-day grace period for the vaccination deadline for a Covered Contractor.</p>
<p>What documents are required to confirm an employee’s COVID-19 vaccination status?</p>	<p>Covered Contractors must require Covered Contractor Employees to show or provide one of the following documents:</p> <ul style="list-style-type: none"> • a copy of the record of immunization from a health care provider or pharmacy; • a copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813_r, published on September 3, 2020); • a copy of medical records documenting the vaccination; • a copy of immunization records from a public health or State immunization information system, or a copy of 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. <p>Covered Contractors may allow Covered Contractor Employees to show or provide a digital copy of such records, including, for example, a digital photograph, scanned image, or PDF of such a record.</p> <p>An attestation of vaccination by the Covered Contractor Employee is not an acceptable substitute for documentation of proof of vaccination.</p>
<p>Does the COVID-19 vaccination requirement apply to remote workers?</p>	<p>Yes. An individual working on a Covered Contract from their home is a Covered Contractor Employee and must comply with the vaccination requirement, even though the employee’s residence is not considered a Covered Contractor Workplace.</p>



<p>Does the COVID-19 vaccination requirement apply to anyone else?</p>	<p>Covered Contractors “are strongly encouraged” to incorporate similar vaccination requirements into their contracts with non-covered vendors who perform work at Covered Contractor Workplaces but who do not work on or in connection with a federal contract.</p>
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COVID-19 Masking & Physical Distance Requirements

<p>What is the masking requirement under the Guidance?</p>	<p>Covered Contractors must ensure that all individuals, including Covered Contractor Employees <u>and visitors</u>, comply with published CDC guidance for masking and physical distancing at a Covered Contractor Workplace.</p> <p><u>Fully Vaccinated</u></p> <p>In areas of high or substantial community transmission, fully vaccinated people must wear a mask in indoor settings, except for limited exceptions.</p> <p>In areas of low or moderate community transmission, fully vaccinated people do not need to wear a mask.</p> <p><u>Not Fully Vaccinated</u></p> <p>Individuals who are not fully vaccinated must wear a mask indoors and in certain outdoor settings regardless of the level of community transmission in the area.</p> <p>Covered Contractors must require individuals in Covered Contractor Workplaces who are required to wear a mask to:</p> <ul style="list-style-type: none">• Wear appropriate masks consistently and correctly (over mouth and nose).• Wear appropriate masks in any common areas or shared workspaces (including open floorplan office space, cubicle embankments, and conference rooms).• For individuals who are not fully vaccinated, wear a mask in crowded outdoor settings or during outdoor activities that involve sustained close contact with other people who are not fully vaccinated, consistent with CDC guidance. <p>Notably, the Guidance defines “mask” as any mask that is consistent with CDC recommendations, and <u>specifically excludes “masks with exhalation valves, vents, or other openings; face shields only (without mask); or masks with single-layer fabric or thin fabric that does not block light.”</u></p>
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Guidance for Federal Contractors and Subcontractors

Page 7

<p>What obligations do Covered Contractors have to monitor transmission rates and adjust their policies?</p>	<p>The Guidance directs Covered Contractors to check the CDC COVID-19 Data Tracker County View website for community transmission information at least weekly to determine level of community transmission. Additionally, the Guidance states that when the level of community transmission increases from low or moderate to substantial or high, contractors/ subcontractors should put in place more protective workplace safety protocols consistent with published guidelines.</p> <p>However, when the level of community transmission is reduced from high or substantial to moderate or low, the level must remain at that lower level for at least two consecutive weeks before contractors/ subcontractors utilize protocols for areas of moderate or low community transmission.</p> <p>The Clause issued by the FAR Council also clarifies that contractors are expected to comply with any subsequent Task Force Guidance that is published during the performance of the contract.</p>
<p>Who is considered “fully vaccinated” under the Guidance?</p>	<p>People are considered fully vaccinated for COVID-19 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. Currently, the Guidance does not include a timeline for when vaccination status expires or mention vaccine boosters.</p> <p>The Guidance provides additional guidance regarding specific COVID-19 vaccines, including clinical trials.</p>
<p>What is the physical distancing requirement under the Guidance?</p>	<p><u>Fully Vaccinated</u> Fully vaccinated individuals do not need to physically distance regardless of the level of transmission in the area.</p> <p><u>Not Fully Vaccinated</u> To the extent practicable, individuals who are not fully vaccinated should maintain a distance of at least 6 feet from others at all times, <u>including in offices, conference rooms, and all other communal and work spaces.</u></p>
<p>Are there exceptions to the masking and/or physical distancing requirements?</p>	<p>Yes. A Covered Contractor may be required to provide an accommodation to Covered Contractor Employees who cannot wear a mask because of a disability or a sincerely held religious belief, practice, or observance.</p> <p>Covered Contractors may provide for exceptions to mask wearing and/or physical distancing requirements consistent with CDC guidelines.</p>



	<p>Examples might include when an individual is alone in an office with floor to ceiling walls and a closed door, or for a limited time when eating or drinking and maintaining appropriate distancing.</p> <p>Any such exceptions must be approved <u>in writing</u> by a duly authorized representative of the Covered Contractor.</p> <p>Masked individuals may be asked to lower their masks briefly for identification purposes in compliance with safety and security requirements.</p>
<p>Does masking and/or physical distancing requirements apply to remote workers?</p>	<p>No. An employee's residence is not a Covered Contractor Workplace, so the employee does not need to comply with the masking and physical distancing requirements while at home.</p>

Implementation & Updates

<p>How must a Covered Contractor implement these protocols?</p>	<p>Covered Contractors must designate a person(s) to coordinate implementation of and compliance with the Guidance at Covered Contractor Workplaces.</p> <p>The designated individual(s) must ensure that 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.</p> <p>This includes communicating the required workplace safety protocols and related policies by email, websites, memoranda, flyers, or other means and <u>posting signage at Covered Contractor Workplaces that sets forth the requirements and workplace safety protocols in the Guidance in a readily understandable manner.</u></p> <p>Specifically, Covered Contractors should post signage at entrances to Covered Contractor Workplaces providing instructions on safety protocols for fully vaccinated and not fully vaccinated individuals, while at the Covered Contractor Workplace.</p>
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Guidance for Federal Contractors and Subcontractors

Page 9

How does the Order and Guidance relate to any contrary state or local law or ordinance?	The Order and Guidance are issued under federal law and supersede any contractor state or local law or ordinance, including those that seek to prohibit compliance with any of these workplace safety protocols. Nothing in the Guidance excuses noncompliance with any applicable state law or municipal ordinance establishing <i>more protective</i> workplace safety protocols than those established under the Guidance.
Could these requirements be amended or updated?	Yes, and if so, then Covered Contractors must, for the duration of the Covered Contract, comply with all Task Force guidance, including any new guidance approved by the Director.

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ⁱ On January 20, 2021, President Biden signed Executive Order 13991 directing executive departments and agencies to implement COVID safety measures for on-site federal contractors. While at a federal workplace, Covered Contractor Employees must also comply with any additional agency workplace safety requirements.

ⁱⁱ The Order states that "contract or contract-like instrument" shall have the meaning set forth in the Department of Labor's proposed rule, "Increasing the Minimum Wage for Federal Contractors," 86 Fed. Reg. 38816, 38887 (July 22, 2021).

ⁱⁱⁱ Several federal court lawsuits have been filed to challenging the Order, including a lawsuit by federal workers and contractors filed on September 23 in U.S. District Court in Washington (see Gregg Costin et al v Joseph R. Biden, 1:21-cv-2484, U.S. District Court for the District of Columbia (Washington)).

^{iv} See <https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf>

^v See the Order for specific terms of applicability.