

New COVID-19 Workplace Safety Guidance for Federal Contractors

Litigation Alert
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The Safer Federal Workforce Task Force (Task Force) released guidance last week ([the Guidance](#)) indicating that federal contractors will soon be required to enforce new employee vaccination, masking, physical distancing, and compliance monitoring requirements via a forthcoming Federal Acquisition Regulation (FAR) clause. The Guidance signals the Biden administration's intention to enlist the procurement industry in the nation's battle against the COVID-19 pandemic and will impact contractors and subcontractors of every size, even their most seemingly removed employees. Here is what we know about the new requirements, what remains to be determined, and what contractors and subcontractors should expect to see next.

What We Currently Know

In our [last alert](#), we discussed the Biden [Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors](#) (the Order) issued on September 9, 2021. The Order signaled that executive departments and agencies will soon include a new FAR clause in "covered contracts and contract-like instruments" that will require contractors and subcontractors to comply with the federal COVID-19 workplace safety guidance issued by the Task Force.

The Task Force's latest Guidance, issued last Friday, previews the requirements of the new FAR clause, which will address: (1) employee vaccination requirements and exceptions, (2) masking and social distancing protocols in covered workplaces, and (3) compliance monitoring of these workplace requirements.

The Guidance sets forth a very broad definition of "covered contracts and contract-like instruments," and "strongly encourage[s]" agencies to apply the upcoming clause even to certain non-covered contracts (including those for supplies). This makes it likely that there will be very few contracts or contract-like instruments (such as Other Transaction Agreements (OTAs)) exempt from the new requirements. It also increases the likelihood that the expected FAR clause will be a mandatory flowdown to subcontracts – for both supplies and services – at all tiers. Notably, the clause will also apply even when the contractor also is subject to other federal workplace requirements, such as the Occupational Safety and Health Association's (OSHA's) Emergency Temporary Standard. Below we describe the likely contents of the upcoming FAR clause and define the key terms used in the Guidance.

Vaccine Requirements

Covered contractor employees must be fully vaccinated no later than December 8, 2021. Thereafter, all covered employees must be fully vaccinated as of the first day of the period of performance on any newly awarded or extended covered contract containing the FAR clause. Covered employees must provide their employers proof of vaccination, such as a COVID-19 vaccination card or other medical documentation. There is a limited exception for employees who are not vaccinated because of a disability (including medical conditions) or a sincerely held religious belief, practice, or observance, but otherwise covered employees must be fully vaccinated even if they:

- Work remotely from home
- Are willing to submit to weekly or bi-weekly testing
- Have a prior COVID-19 infection

- Produce a recent antibody test
- Will work in an outdoor setting
- Will work only at one building, site, facility, or floor (unless the contractor can affirmatively determine they will not come in contact with others)

Masking and Social Distancing

Covered contractors also must comply with Center for Disease Control (CDC) guidance on masking and physical distancing at a covered contractor workplace. Subject to the exceptions for disability and religious beliefs, unvaccinated persons must at all times wear a mask and maintain at least six feet distance from other employees. Fully vaccinated persons must wear a mask if they work in areas of high or substantial community transmission, but not in areas of low or moderate transmission. Fully vaccinated persons are not required to practice social distancing regardless of the transmission levels in their area. Contractors and subcontractors should check the [CDC COVID-19 Data Tracker County View](#) website to determine the appropriate workplace protocols in areas where they have covered employees.

COVID-19 Safety Coordinator

The Guidance introduces a new requirement mandating that covered contractors "designate a person or persons to coordinate implementation of and compliance with this Guidance and the workplace safety protocols." This individual must ensure employees observe the vaccination requirement and its documentation, disseminate information regarding the protocols, and enforce the masking and social distancing requirements. While some contractors and subcontractors may easily add these requirements the responsibilities of a current employee, others will need to think strategically about the best-situated individual to take on the new responsibilities or the benefits of hiring someone new.

What Remains to Be Seen

While the Guidance begins to address questions about the scope and applicability of COVID-19 safety requirements, it also highlights potential issues for contractors and subcontractors to monitor going forward.

- **Covered Contracts:** The Guidance sets forth the definition of "covered contracts" required by the Order. Consequently, it does not expressly address whether the new requirements will apply to contracts for commercial items and commercial off-the-shelf (COTS) items or to Contract Line Items (CLINS) for supplies in contracts and subcontracts requiring the delivery of both services and supplies. But, as noted above, agencies are "strongly encouraged" to include the new FAR clause even in certain non-covered contracts (*e.g.*, those below the simplified acquisition threshold and for manufactured products) and there has been no indication that these other categories will be exempted. These are critical questions that hopefully will be addressed by the FAR Council in the coming weeks.
- **Vaccine Exceptions:** While the vaccine and masking/distancing requirements are subject to limited exceptions for employees with a disability or "sincerely held religious belief, practice, or observance," it is up to contractors to determine when an accommodation is warranted. The Task Force has not provided factors that contractors should consider when making this decision; guidance on how to judge the sincerity of a religious belief, practice, or observance; or identified avenues of relief available to employees who are denied accommodation. These are potential blind spots for the contracting community and contractors should consider conferring with counsel when weighing employee accommodation requests.
- **Tracking "Fully Vaccinated" Status:** Under the Guidance, a person is "fully vaccinated" after receiving the second shot of an approved two-dose vaccine or one shot of an approved single-dose vaccine. The definition of "fully vaccinated" could be tricky to implement, however, considering the ongoing medical debate over the need for and timing of booster shots to address waning immunity (six to eight months after being vaccinated) and the threat of COVID-19 variants. The Guidance acknowledges this

implicitly, noting that "[t]here is currently no post-vaccination time limit on fully vaccinated status," but that such a limit could be enacted based on CDC guidance. Therefore, covered contractors should expect to see updated guidance on this subject as medical research and CDC recommendations evolve.

What's Next?

Contractors can anticipate several developments in the coming weeks and months:

- **FAR Council Rulemaking (October 8, 2021)**: The FAR Council will begin to direct agencies on the new requirement by October 8, 2021. This quick turnaround, coupled with the recommendation that the clause be included in certain non-covered contracts, suggests that contractors should be preparing now to comply with a new FAR clause regardless of whether their contracts are specifically covered.
- **Agency-Specific Requirements (October 8, 2021)**: As the FAR Council prepares to issue the new FAR clause, agencies are expected to develop guidance on incorporating the new requirement into their FAR-covered contracts and contract-like instruments. Contractors should monitor these developments, as their direct customers could add to or modify the FAR-based guidance issued by the FAR Council.
- **Contract Extensions and Option Exercises (October 15, 2021)**: The new FAR clause must be incorporated at the time an option is exercised, or an extension is made on contracts awarded prior to October 15 where performance is ongoing.
- **New Contracts (November 14, 2021)**: The new FAR clause must be incorporated into contracts awarded on or after November 14. Agencies must include the new FAR clause in solicitations issued between October 15 and November 14 and are encouraged to include the clause in contracts awarded during this time period but are not required to do so unless the solicitation for such contract was issued on or after October 15.
- **Ongoing Task Force Guidance**: Finally, the Guidance anticipates that requirements will evolve to address the shifting threat of the pandemic. If the government's past guidance on COVID-19 safety protocols are any indication, contractors and subcontractors should expect to see potentially significant changes in their compliance obligations. While the hope is that the worst is behind us — and that the need for safety protocols will ease over time — the keys to success for any organization are to remain well-informed and flexible.

We will continue to monitor and report on the developments in COVID-19-related requirements for contractors and subcontractors. In the meantime, if you have questions about the COVID-19 safety requirements for federal contractors and subcontractors, please contact one of the Miller & Chevalier attorneys listed below:

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