



Task Force announces details of federal contractor vaccine mandate

27 September 2021

The Safer Federal Workforce Task Force (Task Force) has issued its guidance (Guidance) regarding the COVID-19 safety protocols that federal contractors must implement under President Biden’s recent Executive Order 14042. The Guidance requires covered contractors and subcontractors to adopt a “hard” vaccine mandate—that is, to ensure that covered employees are fully vaccinated for COVID-19, subject only to legally required medical and religious exemptions, by December 8, 2021. The mandate extends broadly not only to employees working directly on federal contracts, but also to those such as human resources, billing, and legal personnel who perform work “in connection with” covered contracts, and to all other employees working in the same location as such employees. Certain employees who work remotely are also covered. Covered contractors must implement safety protocols related to masks and social distancing in their workplaces as well.

President Biden’s September 9, 2021 [Executive Order 14042](#) (Order) requires executive agencies to include a clause in certain federal contracts and contract-like instruments requiring contractors and subcontractors to comply with COVID-19 safety protocols promulgated by the Task Force. On September 24, 2021, the Task Force released its [Guidance](#) establishing these protocols. We summarize key components of the Guidance below.

Which contractors are covered by the new requirements?

The Guidance applies to **any prime contractor or subcontractor** (regardless of size) that is a party to a “**contract or contract-like instrument**” that includes the new clause described in the Order.

The Guidance adopts the definition of “contract or contract-like instrument” contained in the Order and reiterates the timeline set forth in the Order for the Federal Acquisition Regulatory (“FAR”) Council to develop the required clause. As discussed in our prior post about the Order (available [here](#)), “contract or contract-like instrument” is defined consistently with the Department of Labor’s proposed rule, [Increasing the Minimum Wage for Federal Contractors](#). The Guidance reflects that the requirements are focused on certain service contracts and states that covered contracts include “contracts covered by the Service Contract Act, contracts covered by the Davis-Bacon Act, concessions contracts not otherwise subject to the Service Contract Act, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the

general public.” The Guidance also states that the term “contract” is to be interpreted broadly and includes, in addition to bilateral agreements, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; and certain purchase orders, among other instruments.

The new clause will apply on or after **October 15, 2021** only to new contracts, solicitations, contract extensions and renewals, and options exercised under existing contracts. However, the Guidance, like the Order, states that agencies are “**strongly encouraged**” to incorporate the vaccination and safety protocols into **existing contracts** to the extent consistent with law. The Guidance also strongly encourages agencies to apply the requirements to certain contracts that are **not covered** by the Order.

Are subcontractors covered by the new requirements?

Yes. Prime contractors must incorporate the required clause in covered first-tier subcontracts. Covered first-tier subcontractors, in turn, must flow the clause down to covered lower-tier subcontractors, and so on down the chain.

What is the vaccination requirement?

Contractors must adopt a “**hard**” **vaccine mandate**, meaning that **all covered contractor employees must be fully vaccinated** (as generally defined by the Centers for Disease Control and Prevention (CDC)), and subject only to legally required disability and religious exemptions discussed below. This is a significant departure from the “**soft mandate**” contained in the President’s August 2021 [directive](#) for “onsite” federal contractors, under which employees could choose to “opt out” of vaccination for any reason (even if unrelated to a disability or religious reason) by agreeing to be regularly tested for COVID-19.

When must covered contractor employees be vaccinated?

Covered contractor employees who are not entitled to exemption must be fully vaccinated by **December 8, 2021**, or, if later, the first day of performance on a covered contract. The Guidance authorizes agencies to approve limited exceptions for no more than 60 days based on “urgent, mission critical need.”

Which employees must be vaccinated?

The vaccine mandate applies to all full-time or part-time employees working “on or in connection with a covered contract” or “at a covered contractor workplace.” Because the Guidance defines these terms expansively, the vaccination requirement may cover most or all employees of a covered contractor.

An employee works “**in connection with a contract**” even if the employees’ work is not called for under the contract, as long as the work is “necessary to the performance of the contract.” The Guidance states that employees in support functions such as “human resources, billing, and legal review” meet this standard.

A “**covered contractor workplace**” is any location **controlled by the contractor** where even **one** contractor employee working on or in connection with a covered contract is **likely to be present** during the contract performance period. **Outdoor** as well as indoor work locations are covered. A “covered contractor workplace” also includes a federal workplace.

Where the covered contractor employee works on only one floor of the contractor's building, or in one building on a campus with multiple buildings or facilities, **all** employees working at that building or campus are covered by the vaccine mandate unless the contractor can "affirmatively determine" that the covered contractor employee will have **no interactions** with non-covered employees during the contract performance period, including, for example, in common areas, elevators, and parking garages. This is a demanding standard that will make it challenging for large contractors, such as universities, to limit the vaccine mandate to discrete segments of their workforce.

Do fully remote employees have to be vaccinated?

Yes. The Guidance states that "[a]n individual working on a covered contract from their residence is a covered contractor employee" subject to the vaccination mandate, **even if the employee never works in a contractor or Federal workplace**. The Guidance does not specifically state whether an employee working from home "in connection with" (rather than "on") a covered contract is required to be fully vaccinated; however, because the definition of "covered contractor employee" includes individuals working "in connection with" a covered contract, it is foreseeable that the government would take the view that those individuals, even if working remotely, are covered.

Should contractors provide accommodations (exemptions) to the vaccine requirement?

Yes. Contractors are required to provide accommodations to the vaccination requirement for "legally required" purposes, such as for **disability** (which includes medical conditions) and **sincerely held religious beliefs, practices, or observances**. It is the contractor's responsibility to consider and decide accommodation requests. However, if the federal agency is a joint employer of the employee under applicable law, both the agency and the contractor should jointly review and consider what, if any, accommodation to make.

Employees who had a prior COVID-19 infection are not exempt from the vaccination requirement.

How do contractors validate employees' vaccination status?

Covered contractor employees must present **documentary proof** of vaccination. The acceptable forms of proof are a copy of the employee's:

- Record of immunization from a health care provider or pharmacy;
- COVID-19 Vaccination Record Card;
- Medical records documenting the vaccination;
- Immunization records from a public health or state immunization information system; or
- Any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of healthcare professional or clinic site administering the vaccine.

Employee **attestations of vaccination status are not sufficient**. Thus, contractors that have been relying on employee attestations will now be required to ask for documentation. Likewise, **antibody tests** are not sufficient proof of vaccination.

The required proof can be either **shown or provided**, and may be in hard copy or digital format, such as a digital photograph or PDF. Contractors considering whether to collect vaccine documentation from employees (rather than simply recording that the document has been viewed) should keep in mind that retaining such documentation may trigger the 30+ year medical record retention requirement under the Occupational Safety and Health Administration Act (OSHA).

What must a contractor do if a covered contractor employee does not comply with the vaccine requirement or obtain an accommodation?

The Guidance does not answer this question. Contractors should consult with human resources and legal counsel to determine an appropriate approach for such employees.

Must contractors require third parties in their workplaces to be vaccinated or ask them about their vaccination status?

No, however, the Guidance encourages contractors to require the vaccine for on-site third parties such as food service, security, and groundskeeping workers. Also, as noted above, to the extent the third party works for a covered subcontractor, the contractor must flow down the required clause into its subcontract which will require the covered subcontractor to mandate vaccination of its employees. In either case, however, the contractor is not required by the Guidance to directly ask the third party about vaccination status.

Besides vaccination, what other workplace safety protocols does the Guidance require?

All individuals at a covered workplace, including employees and third parties, must comply with [CDC guidance](#) for masking and social distancing.

Generally, this means that individuals who are **not fully vaccinated** (e.g., employees who are entitled to an exemption) must **wear a mask** indoors and in crowded outdoor settings or during outdoor activities that involve close contact with other unvaccinated people. Additionally, people who are not fully vaccinated must **maintain six feet of distance** from others at all times as practicable.

Fully vaccinated individuals are required to wear a mask in indoor settings in areas of high or substantial community transmission, as determined by the [CDC's COVID-19 Data Tracker](#), but are not required to do so in areas of moderate or low community transmission. Fully vaccinated individuals do not need to physically distance, regardless of transmission level.

There are certain limited exceptions to masking, such as when an individual is alone in an office with floor to ceiling walls and a closed door, or brief periods of eating or drinking while maintaining appropriate distancing. There is no exception for cubicles or “open floorplan office space.”

Who at the contractor has responsibility for implementing the Guidance?

All covered contractors must designate a specific person (or persons) to coordinate implementation of and compliance with the Guidance. Among other responsibilities, the designated person must communicate the required safety protocols, including by **posting signs** at covered workplaces, and ensure that employees show or provide proof of vaccination.

May contractors exceed the Guidance? And what should a contractor do if covered by both the Guidance and the forthcoming OSHA ETS?

Contractors may exceed the requirements voluntarily, or in order to comply with applicable laws that are more protective than the Guidance. As noted above, moreover, agencies are encouraged to apply the requirements to a wider scope of contracts than is specified in the Order.

Contractors with 100 or more employees will be required to comply with a forthcoming OSHA COVID-19 Emergency Temporary Standard (ETS), which, unlike the Guidance, is expected to require paid vaccination leave. (For more information about the ETS, see our [prior post](#)). That said, to the extent the ETS is less protective than the Guidance, covered contractors must follow the Guidance.

Likewise, contractors covered by the anticipated vaccination rule that will be issued by the Centers for Medicare and Medicaid Services (CMS) will need to comply with any additional requirements imposed by that rule.

What are the penalties for noncompliance?

As was the case in the Order, the Guidance is silent on this topic. Depending on the circumstances, remedies for a contractor's noncompliance could include default termination by the government, negative performance reviews, cost disallowance, audits, and in egregious cases, there is the potential for suspension, debarment, and/or liability under the False Claims Act.

Implications for contractors

The Order and/or the Guidance may be challenged in court. Given the impending compliance deadlines, and the length of time that it can take for an individual to become “fully vaccinated,” contractors should not delay preparing for compliance now by taking the following steps:

- **Determine whether the contractor is likely to be covered by the Guidance.** See the discussion above regarding what is a covered contract or subcontract.
- **Determine which employees and workplaces are covered and whether to meet or exceed the Guidance.** The Guidance applies broadly, including requiring vaccination of all employees working “on or in connection with” a covered contract, and all other employees who work in the same workplace as such employees. Because of this broad scope, contractors must decide whether to limit their vaccination mandate only to the minimum required by the

Guidance, or whether, for ease of administration or other reasons, to impose the Guidance more broadly. There is no one-size-fits-all approach.

- **Develop and disseminate a vaccination policy and exemption request forms and establish an accommodation process.** When setting policy deadlines, such as the date to submit an accommodation request, bear in mind that the interactive process for deciding accommodation requests can be time consuming.
- **Appoint an individual (or individuals) to coordinate compliance.** This person should handle checking proof of vaccination status and ensure that masking and physical distancing requirements are properly communicated and followed.
- **Consider whether proof of vaccination already received from employees must be updated.** For example, contractors that accepted attestations of vaccination (which are not acceptable proof of vaccination under the Guidance) must now obtain new proof of vaccination from employees.
- **Monitor for continued Task Force Guidance.** The Task Force has stated that it may update its Guidance and that contractors will be required to comply with all updates.

If you need assistance complying with the Guidance, please contact an author of this post or the Hogan Lovells lawyer with whom you regularly work.

Authored by William Ferreira, George Ingham, Mike Mason, Joy Sturm, Allison Pugsley, Michael Scheimer, Stacy Hadeka, Amy Folsom Kett, Zachary Siegel, Lauren Olmsted, and Shannon Finnegan*.

*Shannon Finnegan, an author of this post is a Law Clerk in the New York office.

Contacts



William Ferreira

Partner

Washington, D.C.

william.ferreira@hoganlovells.com



George Ingham

Partner

Northern Virginia

george.ingham@hoganlovells.com



Michael Mason

Partner

Washington, D.C.

mike.mason@hoganlovells.com



Joy Sturm

Partner

Washington, D.C.

joy.sturm@hoganlovells.com



Allison Pugsley

Partner

Washington, D.C.

allison.pugsley@hoganlovells.com



Mike Scheimer

Counsel

Washington, D.C.

michael.scheimer@hoganlovells.com



Stacy Hadeka

Senior Associate

Washington, D.C.

stacy.hadeka@hoganlovells.com



Amy Kett

Senior Associate

Northern Virginia

amy.kett@hoganlovells.com

© 2021 Hogan Lovells. All rights reserved. "Hogan Lovells" or the "firm" refers to the international legal practice that comprises Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses, each of which is a separate legal entity. Attorney advertising. Prior results do not guarantee a similar outcome. Hogan Lovells (Luxembourg) LLP is a limited liability partnership registered in England and Wales with registered number OC350977 and registered also with the Luxembourg bar. Registered office: Atlantic House, Holborn Viaduct, Holborn Viaduct, London EC1A 2FG.