

PUBLICATION

Covered Federal Contractors and Subcontractors Must Comply with Biden Administration Vaccine Mandate by January 18, 2022

Authors: Donna M. Glover

September 28, 2021

UPDATE: December 7, 2021

On December 7, 2021, the Biden Administration's vaccine mandate for federal contractors, which was set to take effect on January 4, 2022, meaning that "fully vaccinated" status must be reached by January 18, 2022, was blocked *nationwide* by the U.S. District Court for the Southern District of Georgia (*Georgia v. Biden*, S.D. Ga., No. 1:21-cv-00163, Dec. 7, 2021).

Generally, the plaintiffs (the states of Georgia, Alabama, Kansas, South Carolina, Utah, and West Virginia) made constitutional arguments and claimed the Biden Administration lacks the authority to require vaccinations. The Court stated that allowing the federal vaccine mandate to move forward will have "major impact on the economy at large, as it limits contractors' and members of the workforce's ability to perform work on federal contractors . . . [a]ccordingly, it appears to have vast economic and political significance."

This nationwide injunction follows the November 30, 2021, three-state preliminary injunction (Kentucky, Ohio, and Tennessee) issued by the U.S. District Court for the Eastern District of Kentucky. Ultimately, the viability of the federal contractor vaccine mandate will likely be addressed by the U.S. Supreme Court.

Contractors in the process of implementing the federal mandate should consult with their counsel regarding how to proceed in light of the injunction.

UPDATE: November 15, 2021

On November 10, 2021, the Safer Federal Workforce Task Force (Task Force) updated the Guidance for Federal Contractors and Subcontractors as follows:

January 18, 2022 is the Vaccination Deadline Date

The Task Force initially extended the deadline from December 8, 2021 to January 4, 2022, in connection with the White House Fact Sheet on the OSHA Emergency Temporary Standard (ETS), which has a January 4, 2022 vaccination deadline – that is, if ETS survives the current court battles. Thus, the White House aligned the contractor vaccination deadline to be the same as that of the ETS.

But the current definition of "fully vaccinated" under the Guidance is two weeks after a last vaccination dose; thus, the updated January 18, 2022 deadline results. The "new" deadline applies to employees working at a covered contractor workplace and employees of federal contractors who work onsite at a federal agency.

Updated FAQs

New FAQs of interest include the following:

Q: Is there sample signage that a covered contractor can post at entrances to covered contractor workplaces providing information on safety protocols?

A: Yes. Covered contractors should post signage at entrances to covered contractor workplaces providing information on safety protocols for fully vaccinated and not fully vaccinated individuals and instruct individuals to follow the appropriate workplace safety protocols while at the covered contractor workplace.

As a reminder, contractors and subcontractors are responsible for monitoring the Guidance for updates and complying with any updates issued by the Task Force.

On September 9, 2021, President Biden issued a COVID-19 Action Plan with the objective of getting more people vaccinated. As part of the Plan, President Biden signed Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors (Order).

Generally, under the Order, executive departments and agencies are required to ensure that contracts and contract-like instruments covered by the Order include a clause requiring contractors *and their subcontractors at any tier* to comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force).

On September 24, 2021, and pursuant to the Executive Order, the Task Force released Guidance on COVID-19 workplace safety protocols for federal contractors and subcontractors (Guidance). Under the Guidance, among other requirements, *covered employees must be fully vaccinated by December 8, 2021* (this deadline was later changed to January 18, 2022), unless a covered contractor is obligated to provide an accommodation for a disability or sincerely held religious belief or practice. With few exceptions, the vaccine requirement applies to employees *working on or in connection with* a federal contract plus all employees located at the same workplace as covered employees.

Overview of Workplace Safety Protocols

Pursuant to the Guidance, and in addition to any requirements or workplace safety protocols that are applicable because a contractor or subcontractor employee is present at a federal workplace (not discussed in this article), federal contractors and subcontractors with a covered contract will be required to comply with the following workplace safety protocols:

- COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
- Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces; and
- Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

Covered Contracts

The Guidance provides that a "covered contract" is any contract or contract-like instrument that includes a certain clause as described in the Order. So, it appears that only contracts or contract-like instruments that actually include the clause in the Order are covered. That clause, found in Section 2(a) of the Order, provides that:

Executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A) (agencies), shall, to the extent permitted by law, ensure

that contracts and contract-like instruments (as described in section 5(a) of this order) include a clause that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. **This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force** (Task Force Guidance or Guidance), provided that the Director of the Office of Management and Budget (Director) approves the Task Force Guidance and determines that the Guidance, if adhered to by contractors or subcontractors, will promote economy and efficiency in Federal contracting.

According to the Guidance, the new requirements will apply to certain new contracts and contract extensions and renewals entered into on or after October 15, 2021. The FAQs issued with the Guidance expound on that effective date. Specifically, for contracts awarded prior to October 15, 2021 where performance is ongoing, the clause must be incorporated when an option is exercised or an extension is made. For new contracts, the clause must be incorporated into contracts awarded (or extended by modification or option) on or after November 14, 2021. Between October 15, 2021 and November 14, 2021, agencies must include the clause in the solicitation and are encouraged to include the clause in contracts awarded during that time period but are not required to do so unless the solicitation for such contract was issued on or after October 15, 2021.

Thus, any employer who enters into a federal contract, subcontract, and/or contract-like instrument and/or extensions or renewal of existing contracts or contract-like instruments will be required to comply with the Guidance.

The Order provides that the Guidance will apply to a contract and contract-like instrument if:

it is a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property;

it is a contract or contract-like instrument for services covered by the Service Contract Act, 41 U.S.C. 6701 *et seq.*;

it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b); or

it is a contract or contract-like instrument entered into with the federal government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

Per the Order, the Guidance will not apply to:

grants;

contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended;

contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold, as that term is defined in section 2.101 of the Federal Acquisition Regulation;

employees who perform work outside the United States or its outlying areas, as those terms are defined in section 2.101 of the Federal Acquisition Regulation; or

subcontracts solely for the provision of products.

The Order directs the Federal Acquisition Regulatory Council (FAR Council) to oversee the incorporation of the clause into federal contracts. Although the Guidance applies to covered contracts entered into on or after October 15, 2021, until the FAR Council acts, employers should not have to comply with the Guidance.

Although the Order clearly describes the types of contracts that are covered by the Order, the Task Force FAQs state that agencies may incorporate vaccination and safety requirements into contracts not covered by the Order, such as contracts under the Simplified Acquisition Threshold (\$250,000). It also presumably will allow agencies to modify existing contracts and require compliance even though the contracts were awarded prior to the effective dates of the new rules.

Covered Contractor Employees (*Including Remote Workers*) and Covered Contractor Workplaces

"Covered contractor employee" means any full-time or part-time employee of a covered contractor "working on or in connection with a covered contract or working at a covered contractor workplace." This includes employees of covered contractors *who are not themselves working on or in connection with a covered contract*. This broad definition means that employees who are not working on or in connection with any federal contract will be subject to the Order's requirements because they are in the same workspace as other employees who are working on or in connection with a federal contract or subcontract. The term, however, does not include those contractor employees who only perform work outside the United States or its outlying areas.

The Guidance defines "covered contractor workplaces" as locations "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." The Guidance clarifies that a covered contractor workplace does *not* include an employee's residence. But, even though an employee's residence is not a covered contractor workplace and not subject to the masking and physical distancing requirements at covered contractor workplaces (discussed below), *the FAQs published with the Guidance provide that employees working on a covered contract remotely, even if they never work at a covered contractor workplace or federal workplace during the performance of the contract, are covered employees*. Therefore, those remote workers working on or in connection with a covered contractor must obtain a COVID-19 vaccination.

Mandatory COVID-19 Vaccinations and Other Workplace Safety Protocols

COVID-19 Vaccinations and Vaccine Documentation Requirements

The Guidance provides that covered contractors are obligated to ensure that covered employees are fully vaccinated by December 8, 2021, and they must ensure compliance with COVID-19 workplace safety requirements while in federal workplaces. The Guidance defines "federal workplace" as "any place, site, installation, building, room, or facility in which any Federal executive department or agency conducts official business, or is within an executive department or agency's jurisdiction, custody, or control." The vaccination requirement applies to those employees in covered contractor workplaces as well as those employees of a covered contractor who work at a federal workplace.

"Fully vaccinated" means two weeks after an employee has received the second dose in a two-dose series or two weeks after the employee received a single dose. The Guidance does not address vaccine booster shots. Covered contractors will be required to manage the vaccination process and status of their employees so that compliance is reached by December 8, 2021, unless the contractor is required to provide an accommodation for an employee's disability or sincerely held religious belief. Contractors are responsible for making determinations on employee-requested accommodations in accordance with applicable law (ADA and Title VII).

Covered contractors must require covered employees to show or provide to their employer one of the following documents as proof of vaccination status: a copy of the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record (the CDC card), 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 the vaccine. Covered contractors may allow covered contractor employees to show or provide to their employer a digital copy of such records, including, for example, a digital photograph, scanned image, or PDF of such a record. The Guidance makes clear that employees who have had COVID-19 cannot escape the vaccination mandate, i.e., the "natural immunity" theory some employees are espousing will not work here. Further, anti-body tests are not sufficient to prove vaccination status.

Requirements Related to Masking and Physical Distancing while in Covered Contractor Workplaces; Accommodations Related to Masks

Covered contractors must ensure that all individuals, including covered contractor employees and visitors, comply with published CDC guidance for masking and physical distancing at a covered contractor workplace. "Mask" is defined only to mean "any mask that is consistent with CDC recommendations as set forth [Types of Masks and Respirators](#)." Under the CDC recommendations, masks with exhalation valves, vents, or other openings; face shields only; or masks with single-layer fabric or thin fabric that does not block light, do not constitute a "mask."

The Guidance also requires covered contractors to provide accommodations to covered employees who request accommodations to not wear a mask because of a disability or because of a sincerely held religious belief. As with legally required accommodations related to the vaccine mandate, contractors are required to consider and make determinations on employee-requested accommodations.

Masks – High v. Low Community Transmission

The Guidance provides that in areas of *high* or substantial community transmission, *fully vaccinated people must wear a mask in indoor settings*, except for limited exceptions discussed in this Guidance. In areas of low or moderate community transmission, fully vaccinated people do not need to wear a mask. Further, fully vaccinated individuals do not need to physically distance regardless of the level of transmission in the area.

Covered contractors are required to check the CDC COVID-19 Data Tracker County View website weekly for community transmission information in all areas where they have a covered contractor workplace to ensure they are following proper workplace safety protocols.

Employees who are not fully vaccinated must wear masks indoors and in certain outdoor settings and must maintain at least six feet from others at all times (including in offices, conference rooms, and communal workplaces) *regardless of community transmission*.

Covered Contractors Must Designate a Person to Coordinate COVID-19 Workplace Safety Efforts

Covered contractors also must designate a person or persons to coordinate implementation of and compliance with the workplace safety protocols detailed in the Guidance. The designated person(s) may be the same individual(s) responsible for implementing any additional COVID-19 workplace safety protocols required by local, state, or federal law, and coordinating COVID-19 workplace safety.

The coordinator(s) must ensure that information on required COVID-19 workplace safety protocols are provided to covered employees and all other individuals likely to be present at covered contractor workplaces, including by communicating the required workplace safety protocols and related policies by email, websites, memoranda, flyers, or other means and posting signage at covered contractor workplaces that sets forth the requirements and workplace safety protocols in the Guidance in a readily understandable manner.

The FAQs

The Guidance includes 21 FAQs covering additional information about implementation of the Guidance. A few highlights of the FAQs are:

- As noted above, remote workers working on a covered contract must get vaccinated.
- Covered contractors are not required to provide onsite vaccinations but should make their employees aware of convenient locations to be vaccinated.
- Covered contractors must view or retain a copy of the vaccination card or other approved form of proof of vaccination. Self-attestations of vaccinations by the covered contractor employee is not an acceptable substitute for documentation of proof of vaccine.
- Covered contractors must post signage at entrances to covered contractor workplaces providing information on safety protocols for fully vaccinated and not fully vaccinated individuals.
- Prime contractors are responsible for ensuring that the required clause is incorporated into its first-tier contracts in accordance with the Order, and so on for lower-tier subcontractors; that is the clause "flows down."
- Contractors subject to the pending OSHA Emergency Temporary Standard (ETS) must comply with the ETS and the Order and its Guidance.
- Work performed "in connection with" a covered contract includes, for example, human resources or billing, where the work performed involves duties necessary to the performance of the contract (*i.e.*, overhead employees).
- If the Guidance is updated during performance of the contractor, covered contractors must comply with the updated provisions.
- If the agency that is a party to a covered contract is a "joint employer" as defined by the Rehabilitation Act and Title VII of the Civil Rights Act, both the agency and the covered contractor are responsible to review and consider what accommodations are available.
- The Guidance supersedes any state or local law that prohibits compliance with any of the workplace protocols in the Guidance.

Compliance Timeline

As noted above, for contracts awarded prior to October 15, 2021, the clause must be incorporated at the point at which an option is exercised or an extension is made. For contracts awarded on or after November 14, 2021, the clause must be included. For contracts awarded between October 15, 2021 and November 14, 2021, the clause must be included in the solicitation and agencies 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, 2021.

As discussed above, the Guidance requires covered contractor employees to be fully vaccinated by December 8, 2021. After December 8, 2021, all covered contractor employees must be fully vaccinated by the first day of a new covered contract or the first day of an exercised option or extended or renewed covered contract absent the need of an accommodation.

Federal contractors and subcontractors should become familiar with the Guidance and prepare for compliance for any possible new or existing covered contracts. The Guidance does not allow for a testing option like that of the pending OSHA ETS. Thus, contractors will need to consider whether it will require vaccination for those

employees not working on or in connection with a federal contractor, which may be difficult to parse based on the intricacies of the Order and the Guidance. Further, many questions remain unanswered – for example, will adjustments be made to offset costs of compliance, and for those employees with legal exemptions to the vaccine, will contractors be required to implement testing requirements, which appears to be the case at least for entry to a federal workplace.