

White House Task Force Issues Vaccine Guidance for Federal Contractors

By Cody Weyhofen

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On September 24, 2021, pursuant to President Biden's *Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors* (the "Order"), the Safer Federal Workforce Task Force published guidance regarding COVID-19 vaccination and safety requirements for federal contractors (the "Guidance"). As explained in a prior Seigfreid Bingham client alert, the Order requires certain contracts with the federal government to include a clause specifying 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."

In addition to defining important terms, the Guidance (1) outlines the scope of the vaccination mandate, (2) explains applicable masking and distancing protocols, and (3) requires covered contractors to appoint a COVID-19 safety coordinator.

COVERED CONTRACTS, CONTRACTORS, AND EMPLOYEES

Covered Contracts. Covered contracts include a wide variety of transactions entered into with the federal government, including any contract, contract-like instrument, solicitation, extension, renewal, or exercise of any option under a contract relating to (1) procurements, (2) concessions, (3) constructions, (4) real property leasehold interests, or (5) businesses offering services for federal employees, their dependents, or the general public in connection with federal property or lands. However, the Guidance specifically excludes contracts that are solely for the provision of products.

Covered Contractors. Covered contractors include both primary contractors and subcontractors at any tier who are parties to a covered contract. Primary contractors must "flow the clause down" to the first-

tier subcontractor, who must then flow the clause down to the next lower-tier subcontractor.

Covered Contractor Employees. Covered contractor employees are any full- or part-time employee working “on or in connection with” a contract with the federal government. This encompasses a wide swath of employees, including those who only indirectly support the government contract, such as employees in human resources, information technology, billing, or legal review. However, this does not include employees who only perform work outside of the United States.

VACCINE MANDATE

Requirement. All covered contractor employees must be fully vaccinated by **January 4, 2022**, unless the employee is legally entitled to a religious or medical exemption. Individuals are “fully vaccinated” two weeks after they receive the final dose of an approved vaccine. Even if an employee previously contracted COVID-19 and has since recovered, he or she must still be vaccinated. Unlike previous federal guidance, there is no test-out option for the vaccination requirement. In other words, employees cannot furnish a negative COVID-19 test in lieu of being vaccinated. Moreover, it is immaterial that an employee works remotely or from home. As long as the employee is working on or in connection with a covered contract, he or she must be vaccinated.

Workplace Locations. The vaccine mandate applies to all employees at “workplace locations” where covered employees are “likely to be present.” Accordingly, if some employees at a particular workplace are performing services in connection with a covered contract, *all* employees at the location must be fully vaccinated regardless of whether they are working on or in connection with the covered contract.^[1]

Documentation. Covered contractors are responsible for reviewing their employees’ documentation to prove vaccination status. Acceptable evidence includes a Centers for Disease Control and Prevention (“CDC”) Vaccination Record Card, medical records, or other state or public immunization records. Notably, an employee’s self-attestation that they have been vaccinated is not acceptable.

Accommodations. Covered contractors may be required to provide accommodations to employees who communicate that they are not fully vaccinated because of a disability or sincerely held religious belief, practice, or observance. Contractors should treat requests for “medical accommodations” or “medical exceptions” as requests for disability accommodations.

Urgency Exception. If a federal agency has an “urgent, mission-critical need” to have a covered contractor begin work before the contractor’s employees can be fully vaccinated, the head of the specific agency may approve an exception for the covered contractor. In such an event, the covered contractor must ensure that his or her employees are fully vaccinated within sixty (60) days of beginning work on a covered contract or at a covered workplace. Moreover, the contractor must ensure that his or her employees comply with the masking and distancing guidelines applicable to non-vaccinated individuals during the sixty-day period.

MASKING AND DISTANCING

Requirement. Covered contractors must ensure that all individuals, including both employees and visitors to covered workplaces, comply with the CDC’s guidance relating to masking and physical distancing. As depicted in the figure below, the required masking and distancing protocols depend on the level of community transmission in a particular area and whether the individual is fully vaccinated.

Low or Moderate Community Transmission

Substantial or High Community Transmission

Fully Vaccinated	No mask required. No distancing required.	Must wear mask indoors except for limited circumstances. No distancing required.
Not Vaccinated	Must wear mask indoors and certain outdoor settings. Distancing required indoors and outdoors.	Must wear mask indoors and certain outdoor settings. Distancing required indoors and outdoors.

Level of Transmission. Covered contractors must check the [CDC Data Tracker](#) at least once a week for updates regarding the level of transmission in a particular area. If the level of transmission is upgraded from low/moderate to substantial/high, contractors must implement the heightened masking and distancing protocols immediately. Conversely, if the level of transmission is downgraded from substantial/high to low/moderate, the level of transmission must remain at that lower level for at least two (2) consecutive weeks before the contractor implements the less strenuous masking and distancing protocols.

Exceptions. Paralleling previous federal guidelines, there are exceptions to the masking requirements, including when an individual is alone in an enclosed office, when an individual is eating or drinking and maintaining proper social distancing, where masks would create a workplace health or safety risk, or when an individual cannot wear a mask due to a medical condition or sincerely held religious belief.

COVID-19 SAFETY COORDINATOR

Requirement. Covered contractors must appoint one or more persons responsible for coordinating, implementing, and enforcing compliance with the protocols outlined above. Specifically, the coordinator(s) must ensure employees tender proof of their vaccination status and ensure both employees and visitors comply with masking and distancing guidelines. Finally, the coordinator(s) must communicate the required protocols to employees and visitors, whether it be via emails, websites, flyers, or other means that set forth the guidance in a readily understandable manner.

PREPARING FOR COMPLIANCE

Phase-In Period. Whether the clause must be included in a covered contract depends on when the contract was formed.

- **Before October 14, 2021.** If the contract was awarded before October 14, 2021 (i.e., performance is ongoing), the clause must be incorporated only if the contract is renewed or an option is exercised.
- **October 15, 2021 – November 14, 2021.** Agencies must include the clause in any solicitation issued during this time. The clause must be incorporated into any contract awarded during this time only if the solicitation for such contract was issued on or after October 15, 2021.
- **On or After November 14, 2021.** The clause must be incorporated into any covered contract entered on or after November 14, 2021.

Preemption. The Guidance specifically states that the vaccine mandate and other safety protocols referenced in the Order supersede any contrary state or local ordinances. Therefore, federal contractors with employees in states attempting to prohibit vaccination requirements will still need to comply with the Guidance. Moreover, covered contractors with more than one hundred (100) employees will need to follow the vaccination mandate even though the forthcoming OSHA Emergency Temporary Standard will likely include a testing alternative for similarly sized private employers.

This article is general in nature and does not constitute legal advice. Please note that the mandates referenced above present many novel legal questions, and we encourage you to seek legal advice for the application of these and related laws to your specific situation. Please note that legal requirements are changing on a daily basis. Readers with legal questions should consult the author, Cody Weyhofen (CWeyhofen@sb-kc.com), or the following shareholders in Seigfreid Bingham's Employment Law Group, including John Vering (JVering@sb-kc.com), Mark Opara (MOpara@sb-kc.com), John Neyens (Johnn@sb-kc.com), Brenda Hamilton (BHamilton@sb-kc.com), Shannon Johnson (SJohnson@sb-kc.com), or your regular contact at Seigfreid Bingham at 816-421-4460.

[1] The Guidance does provide a limited exception for instances where the covered contractor can affirmatively determine there will be no contact between covered employees and non-covered employees, meaning there can be no brief contact in common areas such as lobbies, elevators, stairwells, restrooms, cafeterias, or parking garages.