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## New COVID-19 Vaccination Guidance Issued for Federal Contractors

On September 24, 2021, the Safer Federal Workforce Task Force (the “Task Force”) released new [guidance](#) for federal contractors and subcontractors with instructions for complying with President Biden’s recent [Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors](#) (the “Executive Order” or the “Order”), including its vaccination mandate. The guidance focuses on three main goals: (1) mandatory COVID-19 vaccination for contractor employees unless an employee is legally entitled to accommodation; (2) compliance with masking and social distancing requirements in contractor workplaces; and (3) designation of a coordinator for COVID-19 workplace safety efforts.

The guidance applies to any prime contractor or subcontractor to a federal “contract or contract-like instrument” that includes a clause incorporating the requirements of the Executive Order. The guidance also strongly encourages covered contractors to incorporate the vaccination requirements into non-covered contracts and agreements with non-covered contractors whose employees perform work at covered contractor workplaces but who do not work on or in connection with a federal contract, such as contracts related to food services, security and groundskeeping at covered contractor workplaces. The guidance provides that the vaccine mandate applies to all full- and part-time employees working “on or in connection with a covered contract” or “at a covered contractor workplace.” An employee works “in connection with a contract” when the employee performs work necessary to the performance of the contract, even if the employee is not directly engaged in performing the specific work called for by the covered contract. Therefore, employees in support functions, such as “human resources, billing, and legal review” are also covered.

Generally speaking, the guidance requires covered contractors to ensure that their employees are fully vaccinated against COVID-19 by December 8, 2021, and that all individuals, including employees and visitors, comply with CDC guidance for masking and physical distancing requirements at a covered contractor workplace. Covered contractors may be required to accommodate employees who are not vaccinated or cannot wear a mask because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice or observance. Those employees who work

remotely will not need to comply with the masking and physical distancing requirement, but they must comply with the vaccination requirement if they are performing work in connection with the federal contract.

**Other noteworthy directives in the guidance include:**

- Employees are considered “fully vaccinated” two weeks after they receive the second dose in a two-dose series, or two weeks after they receive a single-dose vaccine.
- Employees working outside of the United States are not required to be vaccinated.
- The vaccination requirement applies to employees who have had a prior COVID-19 infection.
- New employees must be fully vaccinated within 60 days of beginning work on a covered contract or at a covered workplace.
- Requests for “medical accommodation” or “medical exceptions” should be treated as requests for a disability accommodation.
- Covered contractors may choose to provide vaccinations at their workplaces, but they are not required to do so. Covered contractors must ensure their employees are aware of convenient opportunities to get vaccinated.
- Agency heads may approve “urgent, mission-critical” exceptions that would allow employees to begin work on a covered contract or at a covered workplace before becoming fully vaccinated; however, these employees must be fully vaccinated within 60 days of beginning work, and they must comply with masking and physical distancing requirements for individuals who are not fully vaccinated.
- Fully vaccinated individuals must wear masks indoors in areas of high community transmission, but not in low or moderate community transmission areas; unvaccinated individuals must always wear a mask indoors. Contractors may provide written exemptions to mask wearing and/or physical distancing consistent with CDC guidelines; for example, when an individual is alone in an office with floor-to-ceiling walls and a closed door; when eating or drinking; for employees engaged in high-intensity activities; or where the mask could get wet.
- The requirements also apply to all lower-tier subcontractors, except for subcontracts solely for the provision of products.

- The Order applies to small businesses.
- Contractor employees likely to be present during the period of performance of a covered contract on only one floor or a separate area of a covered contractor workplace still are subject to the vaccination requirement unless the covered contractor can affirmatively determine that none of those employees will come into physical contact with a covered contractor employee during the period of performance of a covered contract. This includes interactions through use of common areas such as lobbies, elevators, stairwell, meeting rooms, kitchens, dining areas and parking garages.

Covered contractors also must designate a coordinator to implement COVID-19 workplace safety protocols. The designated coordinator must ensure that information on required COVID-19 workplace safety protocols is provided to covered employees and others likely to be present at the workplace, including communicating the required safety protocols by email, websites, memoranda, flyers or other means, and posting signage at the workplace. This includes communicating the COVID-19 workplace safety protocols and requirements related to masking and physical distancing to visitors and all other individuals present at the workplace. The designated coordinator also must ensure that employees comply with the guidance requirements relating to showing proper vaccination documentation.

#### ***Implementation of the Executive Order***

For contracts awarded before October 15, 2021, where performance is ongoing, the new requirements must be incorporated into the contract at the point at which an option is exercised or an extension is made. For new contracts, the requirements must be incorporated into all contracts awarded on or after November 14, 2021.

The Federal Acquisition Regulatory Council (the “FAR Council”), the Department of Defense (“DoD”) and the General Services Administration (“GSA”) also took steps to implement the requirements of the Order. On September 30, 2021, the FAR Council issued the new [FAR clause and a memorandum](#), which provides guidance to agencies on how to implement the new clause and encourages them to act expeditiously to issue their deviations so the contracting officers may begin to apply the new clause on or before October 15th.

On October 1, 2021, the DoD published Class Deviation [2021-00009](#), which provides guidance to DoD contracting officers on incorporating the new deviation clause. The class deviation states that DoD contracts are subject to the same timeline as originally set forth in the Order with one notable difference—the deviation states contracting officers may implement the clause in solicitations and contracts issued before October 15; however, when modifying existing contracts the contracting officers must use a bilateral modification method to incorporate the clause. This language may allow the

contractor to negotiate additional consideration from the government to recover some of its increased costs associated with the implementation of the new requirements. Finally, the DoD class deviation states contracting officers shall insert the clause into “solicitations, contracts, task orders, and delivery orders for the manufacturing of products,” thereby expanding the scope of the Order, which explicitly excluded contracts “solely for the provision of services.”

Finally, on September 30, 2021, the GSA similarly published Class Deviation [CD-2021-13](#), providing instructions for the GSA acquisition workforce on when to include the new clause in GSA solicitations, contracts and contract-like instruments including leases.

If you have questions about your organization’s management of COVID-19, including how to comply with the new requirements for federal contractors, please contact your Kutak Rock attorney or a member of the firm’s [National Employment Law Group](#). You may also visit us at [www.KutakRock.com](http://www.KutakRock.com).

