

**CLIENT ALERT:****New FAQs Give Guidance for Federal Contractors**

By Gregory Paal

December 2021

Following Executive Order 14042, “Ensuring Adequate COVID Safety Protocols for Federal Contractors” (“E.O.”), federal agencies have begun inserting a mandatory clause into contracts (“Covered Contracts”) requiring federal prime contractors and covered subcontractors at any tier (“Covered Contractors”) to comply with all guidance (“Guidance”) published by the Safer Federal Workforce Task Force (“Task Force”). The Task Force has expanded and clarified its guidance throughout the fall by answering Frequently Asked Questions from both Covered Contractors and Federal Agencies. The Task Force intends to continue updating the guidance as conditions change and the Task Force’s understanding of COVID-19 evolves, so Covered Contractors should stay alert for changes to their contractual obligations as long as the E.O.’s federal contractor vaccine mandate is in effect. The FAQs add to several areas of the Guidance, including **vaccine exemptions, compliance, and applicability.**

*An overview of the E.O. and the Task Force’s initial Guidance is available [here](#). The E.O. is currently facing several legal challenges and has been enjoined by at least one court..*

**Vaccine Exemptions:** The Task Force Guidance recognizes three forms of exemptions an employee might claim to delay receiving a COVID-19 vaccination or avoid it altogether. Employees may have medical conditions that permanently contraindicate vaccination, or they may have

medical conditions that justify delaying vaccination. Finally, employees may claim a religious exemption under Title VII of the Civil Rights Act.

**Medical Exemption:** An employee may be entitled to a medical exemption if they have a condition that makes the COVID-19 vaccine itself dangerous to the employee’s health. The Guidance states that an exemption is warranted when the employee has a severe allergic reaction after a previous dose of a COVID-19 vaccine, or to a component of the vaccine, and an immediate allergic reaction of any severity to a previous dose or a diagnosed allergy to a component of the vaccine. A person who suffered heart inflammation after their first dose of a COVID-19 vaccine should consult their physicians to determine if a subsequent dose is recommended.

**Delayed Vaccination:** The Guidance recognizes many more situations in which delaying vaccination could be clinically appropriate. The Task Force has published a non-exhaustive list of diagnoses that could justify delayed vaccination, including:

- delaying vaccination for 10 days from the first positive COVID-19 test if the employee is asymptomatic;
- delaying vaccination for at least 10 days from the onset of COVID-19 symptoms if the employee is symptomatic, until they have (1) no fever for at least 24 hours

**CLIENT ALERT: New FAQs Give Guidance for Federal Contractors**

December 2021

without using fever-reducing medicine, and (2) improvement in their symptoms other than loss of taste and smell; and

- delaying vaccination for 90 days if the employee is treated for COVID-19 with monoclonal antibodies.

COVID-19 vaccines are recommended for people who are pregnant, might become pregnant, and their partners. Employees cannot delay COVID-19 vaccination on the grounds that they recently received a vaccine for another disease, such as a flu shot. Employees can be considered to be fully vaccinated if they have received any combination of an authorized two-dose vaccine, as long as at least two weeks have passed since they took their second dose.

**Even when delay is appropriate, Covered Contractor employees must receive the vaccine once they are medically cleared to do so.** Covered Contractor employees who have medical reason not to be vaccinated by the contractual deadline must be treated as not fully vaccinated. **Employees who are not fully vaccinated may be denied entry to the federal workplace or Covered Contractor workplace.**

**Religious Exemption:** Employees who hold a sincere religious belief against vaccination may request a reasonable accommodation from their employer under Title VII of the Civil Rights Act. Employers are obligated to determine if a reasonable accommodation is possible without causing an undue burden for the employer, which is defined as more than a *de minimis* cost. Covered Contractor employees who receive a religious exemption

must also be treated as not fully vaccinated. Additional Guidance on handling religious exemption requests is available [here](#).

**Compliance:** Covered Contractors do not have to resolve all requests for reasonable accommodations based on a medical or religious exemption to the vaccination mandate by the time the employee seeking the exemption begins to work on or in connection to a Covered Contract. While a determination is being made, the employee seeking exemption must be treated as not fully vaccinated and must follow all applicable safety protocols. **Covered Contractors with employees who have been barred from the workplace for not being fully vaccinated – regardless of whether they qualify for a legal exemption to vaccination – are not relieved from meeting their contractual obligations.**

The Task Force expects some Covered Contractor employees to refuse to get vaccinated despite not qualifying for a legal exemption. Covered Contractors should determine appropriate means of enforcing the Task Force’s safety Guidance based on its usual process for enforcing workplace policies. The Guidance suggests that best practice for federal agencies is to encourage compliance through a limited period of counseling and education on the evidence-based risks and benefits of vaccination. If that fails, disciplinary measures up to and including termination may be necessary to ensure a safe and healthy workforce. **Though Covered Contractors are not required to immediately terminate employees who do not comply, they are required to ensure that the employee is following all**

December 2021

**applicable workplace safety protocols for not fully vaccinated individuals.** Agencies may also bar unvaccinated Covered Contractor employees from entry to the federal workplace.

Federal agencies are directed to work with Covered Contractors to address compliance challenges. **The Task Force suggests that agencies only take significant actions, such as termination of the contract, when it determines that the Covered Contractor is not making a good faith effort to comply with the Guidance.**

The Guidance also states that the mandatory clause must be incorporated into all lower-tier subcontracts for the Covered Contract, unless the subcontract is solely for the provision of products. This conflicts with the language of the underlying E.O., which explicitly exempts subcontracts that do not meet the federal Simplified Acquisition Threshold, which is currently set at \$250,000. It is unclear whether the Guidance will be updated to resolve the discrepancy between the Guidance and the E.O. If the language of the contract is ambiguous as to what lower tier contracts must contain the mandatory clause, Covered Contractors should clarify with the agency whether it requires the mandatory clause to be incorporated into all lower-tier contracts other than those for the provision of products.

Prime contractors are responsible for ensuring that the mandatory clause is incorporated into all covered first-tier subcontracts. First-tier subcontractors are then responsible for incorporating the clause into all covered second-tier contracts, and so

on. **The prime contractor may presume that the subcontractor is complying with the clause unless the prime contractor has credible evidence of noncompliance.**

**Applicability:** Workplace safety protocols are the same whether the contracted work is performed at a Covered Contractor workplace or a federal agency workplace. Covered Contractors must post signage at entrances to workplaces regarding applicable safety protocols and may take reasonable steps to ensure workforce safety. Sample signage that complies with the Guidance is available [here](#) and [here](#). If the Covered Contractor operates a campus, every part of that campus is covered unless the Covered Contractor can affirmatively determine that no employee working on or in connection with a Covered Contract will come into any contact whatsoever with a non-covered employee.

Covered Contractors should continue to monitor all available Guidance, including the FAQs, to stay up to date with their responsibilities under the mandatory contract clause and the best practices for implementing the Task Force's policies. Though vaccination is a critical dimension of the Guidance, a Covered Contractor with a fully vaccinated workforce has significant compliance burdens.

\*\*\*

Copyright © 2021 Belcher Fitzgerald LLP.  
All rights reserved.

This publication is not intended as legal advice. Before you make any decision that may have legal implications, you should consult with a qualified legal professional for specific legal advice.