

## **CLIENT ALERT:**

# **New Vaccination Guidance for Federal Contractors**

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September 2021

*12/22/21 Update: The contractor mandate has been nationally enjoined as of December 7, 2021 pending a hearing in the 11<sup>th</sup> Circuit.*

On September 9, 2021, President Biden 14 [Executive Order 14042](#), “Ensuring Adequate COVID Safety Protocols for Federal Contractors” (“E.O.”). The E.O. orders all federal agencies to include, by October 15, 2021, a mandatory clause in every new, renewed, and extended covered contract stating that the contractor agrees to comply with all guidance published by the Safer Federal Workforce Task Force (“Task Force”). Using the clause to incorporate the Task Force’s guidance provides the federal government substantial flexibility in the safety measures it imposes on contractors as circumstances evolve. **The E.O. also requires the mandatory clause to be included in all lower tier subcontracts of the prime federal contract.**

*For more information about what contracts and contractors are covered by the E.O., please see our [Vaccine Mandate Client Alert](#).*

The [Task Force published guidance](#) on September 24, 2021 (“Guidance”) directing covered contractors to adopt procedures and safeguards intended to limit the spread of COVID-19 using three primary safety protocols:

1. Mandatory vaccinations

2. Masking and physical distancing while in covered contractor work sites
3. Designation of a COVID-19 safety coordinator

### ***Mandatory Vaccinations:***

- **All employees of covered contractors not legally entitled to an exemption must be fully vaccinated by January 18, 2022.** After January 18th, all covered contractor employees must be fully vaccinated by the first day of the period of performance of the contract. The only exception to this requirement is a 60-day extension for non-compliant contractors that are “mission-critical” for the agency.
- Unlike previous vaccine mandates, **there is no “opt-out” option** permitting employees to produce a negative COVID test once a week in lieu of vaccination.
- Employees are deemed fully vaccinated two weeks after their second dose if they are taking a two-stage vaccine, or two weeks after taking a single-stage vaccine. Accordingly, **employees must take the final primary dose of their vaccine by January 4, 2022**, which is the compliance deadline for the large employer ETS.
- Employees may seek a religious or medical exemption from the vaccine mandate. Employers are obligated to

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engage in an interactive dialogue with the employee to determine whether the employer can provide a reasonable accommodation for the employee.

- **Proof of vaccination by employee attestation is not allowed.** Instead, employees must prove their vaccination status by either showing or providing to their employer an original or physical/digital copy of one of the following:
  - immunization record from a health care provider or pharmacy,
  - COVID-19 Vaccination Record Card,
  - medical records documenting the vaccination,
  - immunization record from a public health information system, or
  - any other official documentation verifying the employee's vaccination status with information regarding (1) the vaccine name, (2) date(s) of administration, and (3) the name of health care professional or clinic site administering vaccine.
- A vaccinated employee who lacks documentation should contact the provider site where they were vaccinated. If that is not possible, the employee should contact their State or local health department's [immunization information system](#). Employers seeking guidance about vaccine documentation can contact their State or local health department.

- Regardless of the type of vaccination record, it is recommended that covered contractors do not take possession of the record. **Employers who take possession of such records could be subject to a 30-year record retention obligation** under OSHA regulations.<sup>1</sup> The employer should instead have the employee show them the proof of vaccination, then record the document produced and the employee's vaccination status.

***Masking and Distancing:***

- Covered contractors are responsible for ensuring that all individuals, including both covered contractor employees and visitors, comply with CDC guidance relating to maintaining physical distance and wearing an [effective face mask](#).
- **Mask wearing is required in indoor workplaces regardless of employee vaccination status if, [based on CDC data](#), the site is in a county with high or substantial community transmission.** As of September 29, 2021, 97.1% of counties in the U.S. have high or substantial community transmission rates. A county is considered to have a moderate or low level of community transmission – relieving vaccinated employees of the indoor mask mandate – if the county's transmission level remains moderate or low *for at least two consecutive weeks*.
- Unvaccinated individuals, including visitors to covered workplaces, must wear masks indoors and during outdoor

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activities that involve sustained close contact with other people who are not fully vaccinated.

- Fully vaccinated individuals do not need to physically distance, but unvaccinated individuals should maintain a distance of at least six feet from others at all times while in a covered workplace.
- Covered contractors may provide exceptions to masking and distancing requirements consistent with CDC guidelines, such as when an individual is alone in an enclosed space, or when they are eating and drinking while maintaining safe distancing. Exceptions may also be made when the employee's work may get their mask wet, or where the mask poses a health, safety, or job duty risk.

### ***Designating Safety Coordinators:***

- **Covered contractors must designate at least one person as a safety coordinator for each workplace.** The coordinator is responsible for ensuring compliance with the Guidance.
- The safety coordinator must provide information on required protocols to both employees and non-employees likely to be present at the workplace. The media by which the covered contractor communicates such policies, including flyers and posters, must therefore be designed to be readily understandable to their likely audience.
- The safety coordinator is responsible for ensuring that employees comply with

the vaccine requirement and the relevant masking and distancing protocols. The safety coordinator must also ensure that employees provide proper vaccine documentation.

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**Coverage:** The Guidance is designed to apply as broadly as possible. It covers all full-time or part-time employees who are either (1) working on *or in connection with* a covered contract – that is, *any* work related to performance of the contract, including administrative support *and fully remote workers* – or (2) present at a covered contractor's workplace, defined as either a federal workplace or any location controlled by the contractor, where *at least one* employee working on or in connection with a covered contract is likely to be present *anywhere on the location* during the contract performance period. Consequently, if one employee at a workplace is covered, all employees at the workplace are deemed to also be covered. Employees who are deemed covered because they share a workplace with a covered employee must comply with the Guidance unless the covered contractor can affirmatively show that the covered employee will have *no contact whatsoever* with otherwise non-covered employees.

**Enforcement:** It is unclear how agencies will enforce the Guidance's mandates, as neither the E.O. nor the Guidance address enforcement. The federal government has several tools it can use to address a breach of contract,<sup>2</sup> ranging from negative performance reviews and termination of the contract to prosecuting contractors under the False Claims Act when they knowingly

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submit fraudulent claims for payment to the government.<sup>3</sup>

**Looking Ahead:** According to the E.O., the Guidance will be incorporated into covered contracts through the mandatory clause beginning on October 15<sup>th</sup>. Now that the Guidance has been published, however, federal agencies have been directed to begin incorporating it into their contracts as soon as practicable. Moreover, agencies have been strongly encouraged to incorporate the clause into contracts that are not covered by the E.O., including existing contracts to the extent consistent with law, contracts for products, and contracts that do not meet the Simplified Acquisition Threshold (currently set at \$250,000). Covered contractors should also be aware that the Task Force may update the Guidance as circumstances warrant.

Employers who currently have or are seeking either contracts with the federal government or subcontracts with federal contractors should begin preparing to comply with the Guidance as soon as possible. To that end, employers should identify covered employees who will be subject to the vaccination mandate, begin designating safety coordinators for each workplace, and prepare appropriate materials to train employees and alert non-employees to applicable masking and distancing policies. Finally, Employers who have already been collecting proof of vaccination from their

employees should ensure that such proof satisfies the Guidance's documentation requirements, particularly as employee attestation is no longer considered sufficient.

**Upcoming Deadlines:**

- **October 8, 2021:** Agencies begin to implement the E.O.
- **October 15, 2021:** Agencies must incorporate the Guidance into all new, renewed, and extended federal contracts
- **January 4, 2022:** Last day for covered contractors' employee to get vaccinated
- **January 18, 2022:** Covered contractors' employees must be fully vaccinated or have a legal exemption

*For more information, you can find the text of the Guidance and answers to Frequently Asked Questions [here](#).*

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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.

<sup>1</sup> 29 C.F.R. § 1910.1020(a) et seq

<sup>2</sup> E.g., 41 U.S.C. § 6503

<sup>3</sup> 31 U.S.C. § 3729 et seq.