

Contractors Are Confronting The Realities Of A Federal COVID-19 Vaccine Mandate

by Sarah K. Bloom, Associate and Gregory M. Wagner, Associate

Since September 9, when President Biden issued his Executive Order imposing a sweeping vaccine mandate for federal contractors, companies have grappled with two primary concerns: how to address the new requirements, and how the mandate will affect their business. President Biden's Executive Order 14042, titled "Ensuring Adequate COVID Safety Protocols for Federal Contractors" requires executive agencies to include in their contracts a clause requiring compliance with all guidance published by the Safer Federal Workforce Task Force ("the Task Force").

Covered Contractors Must Adhere To All Task Force Guidance

The Task Force first issued its COVID-19 Workplace Safety Guidance ("the [Guidance](#)") on September 24, 2021. The Guidance requires contractors and subcontractors with a covered contract to implement certain workplace safety protocols to protect against COVID-19.

Specifically, the Guidance requires all "covered contractor employees" to be fully vaccinated for COVID-19 by December 8, 2021, with certain exceptions for religious and medical accommodations. Because "fully vaccinated" status is not conferred until two weeks after a second dose, first doses were needed by October 25. Hence, contractors must put plans in place now for their employees. The Task Force has issued templates for use by employees requesting an accommodation in the form of a [medical](#) or [religious](#) exemption.

Under the new Guidance, the vaccine mandate applies to 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. Personnel working "in connection with" a covered contract may include human resources, accounting, and legal personnel who support federal contracts, but who do not work directly on a federal project. The vaccine mandate also applies to employees who [share facilities](#) with covered contractor employees, even if those employees are not themselves working on a covered contract. The requirement even covers employees working remotely.

In addition to the vaccine mandate, the Guidance requires contractors to ensure that all covered employees and visitors comply with published Centers for Disease Control and Prevention ("CDC") guidance for masking and physical distancing. Contractors also must designate a person to coordinate implementation of and compliance with the Guidance.

Contractors Must Adhere To FAR 52.223-99, Which Imposes Changing Requirements

In accordance with EO 14042, the FAR Council developed FAR 52.223-99, "Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors." This new clause is required for contracts awarded on or after November 14 from solicitations issued before October 15; new solicitations issued on or after October 15 and contracts awarded under those solicitations; extensions or renewals of existing contracts and orders awarded on or after October 15, 2021; and options on existing contracts and orders exercised on or after October 15, 2021.

Despite the apparent limited application of the FAR clause to new contracts, the FAR Council strongly encourages agencies to apply the Guidance to all contracts – even those awarded before November 14, contracts for the manufacturing of products, and contracts under the simplified acquisition threshold. The FAR Council also encourages agencies to exercise their FAR 1.4 authority to issue class deviations and adopt FAR 52.223-99 immediately, rather than awaiting a formal amendment to the FAR.

Perhaps the most notable aspect of FAR 52.223-99 is its mandate that contractors adhere to all guidance issued by the Task Force “including guidance conveyed through Frequently Asked Questions, **as amended**.” FAR 52.223-99 (c) (emphasis added). By its nature, this clause requires contractors to constantly monitor the FAQs for changes, and to adhere to potentially new interpretations. In light of the ever-changing federal guidance related to COVID-19 safety protocols, this requirement imposes yet another potential ambiguity upon contractors.

Several agencies, including DoD, GSA, DOJ, DHS, and NASA, have already adopted FAR 52.223-99. For example, on October 1, 2021, the DoD required Contracting Officers to incorporate DFARS 252.223-7999, “Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-00009)” into contracts as required by Executive Order 14042. The DoD also authorized its contracting officers to include the clause in solicitations issued before October 15. Notably, the DoD requires a bilateral modification when modifying existing contracts to include the deviation clause.

As of the time of this article, the federal vaccine mandate is facing legal challenges from at least 20 states. *See Florida v. Nelson et al.*, No. 8:21-cv-02524 (M.D. Fla. filed Oct 28, 2021); *Brnovich v. Biden et al.*, No. 2:21-cv-01568 (D. Ariz. filed Sept. 14, 2021); *Georgia v. Biden*, No. 1:21-cv-00163 (S.D. Ga. filed Oct. 29, 2021); *Missouri v. Biden*, No. 4:21-cv-01300 (E.D. Mo. filed Oct. 29, 2021); *Texas v. Biden*, No. 3:21-cv-00309 (S.D. Tex. filed Oct. 29, 2021). Until those matters are decided, however, the mandate remains in place. And as set forth above, vaccine mandates as set forth in the Guidance may soon apply to almost all federal contractors.

Recommended Path Forward For Affected Contractors

- **Review Workspaces For Application And Compliance**

Contractors should carefully review the Guidance and determine how the vaccine mandate applies within their organizations. As noted above, the requirement applies not only to employees working on a covered contract, but also to employees working “in connection with” a federal contract, to include human resources, accounting, and legal. It also applies to employees who share work facilities with those working on a covered contract, even if the employees themselves are not working on or in connection with a covered contract.

Contractors who have federal and commercial business lines should carefully review their office spaces to determine whether, and to what extent, its commercial business lines may be affected by the Guidance. Contractors that have not already implemented an organization-wide vaccination

program may require dedicated work locations for private sector business lines to avoid running afoul of the new federal requirements.

- **Closely Track Costs Of Compliance**

The DoD authorizes contracting officers to include the FAR clause into existing contracts, but requires a bilateral modification to do so. The GSA issued similar guidance addressing existing contracts. GSA's September 30 memorandum states that "[c]ontracting officers shall send a cover letter and modification request to add the clause at FAR 52.223-99 for existing contracts The modification must be bilateral."

Based upon requirements for bilateral modifications, an opportunity exists for contractors to pursue recovery of unanticipated costs of compliance with the Guidance. Contractors who receive a modification to implement the Guidance should review the costs associated with compliance. All direct and indirect costs associated with complying with the Guidance requirements should be closely tracked. These may include costs to vaccinate employees, downtime associated with getting the vaccine and addressing associated side effects, designating an individual to ensure compliance, processing requests for medical or religious exemptions, any necessary physical changes to the workplace, costs to test employees for COVID-19, costs associated with implementing visitor protocols, subcontractor costs, loss of productivity, etc. As mentioned above, many agencies have already applied the mandate beyond what is required in EO 14042.

- **Labor Shortages May Result From The Vaccine Mandate**

Current CDC data indicates that over 66% of Americans have received at least one dose of a COVID-19 vaccination. Vaccination rates in particular industries or localities, however, may be substantially lower. A recent [study](#) conducted by the Center for Construction Research and Training found that, as of September 2021, only 53.8% of construction workers surveyed were vaccinated, compared to 80.9% in all other occupations. Further, 41.8% of construction workers surveyed reported vaccine hesitancy, compared to only 16.8% in all other occupations. Thus, in some industries, the new requirements may compound [labor shortages](#) that have already plagued contractors throughout the year.

Contractors should keep careful records regarding their efforts to staff federal projects. While a labor shortage generally does not entitle a contractor to relief from the government, certain rare exceptions have been recognized where the government caused the labor shortage in question. *See J. A. Jones Const. Co. v. United States*, 390 F.2d 886, 893 (Ct. Cl. 1968) (Air Force had a duty to disclose plans for a high-priority construction program involving payment of premium wages in same labor area as contractor's project, creating labor shortage; granting summary judgment as to liability and referring for further proceedings as to quantum). At a minimum, labor shortages arising from the vaccine mandate may require contractors to estimate increased prices or premium prices in their proposals for future federal contracts.

If you have questions about the Guidance or its impact on your business, do not hesitate to contact Watt Tieder for assistance.