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Labor & Employment Alert

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December's deadline for COVID-19 vaccinations for federal contractors: Your questions answered

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We address common questions regarding new Safer Federal Workplace Task Force compliance requirements, including the vaccination mandate for employees of federal contractors and subcontractors ahead of the December 8 vaccination deadline.



What's the Impact?

- / Federal contractors and subcontractors must comply with these new federal requirements and incorporate a compliance provision into most federal contracts
- / The new guidance defines covered contracts/subcontracts, outlines timeframes for compliance, mandates vaccinations for covered contractors/subcontractors, and discusses distancing and face-covering obligations

On September 24th, the Safer Workforce Task Force (Task Force) announced its [Guidance for Federal Contractors and Subcontractors](#) (Guidance), as directed by President Biden's [Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors](#) (Executive Order). [President Biden announced his Executive Order on September 9](#) as part of his six-point [COVID-19 Action Plan](#). Under this Guidance, many employees of federal contractors and subcontractors

will be required to be “fully vaccinated” against COVID-19 (as defined below) by December 8, 2021.

The Guidance is lengthy. In basic terms, what is required of federal contractors?

The following safety protocols are required:

- / All covered contractor and subcontractor employees must be fully vaccinated against COVID-19 by December 8, except those who are eligible for and are granted a medical or religious exemption under the Americans with Disabilities Act (ADA) or [Title VII of the Civil Rights Act of 1964](#).
- / All covered contractors and subcontractors must comply with any Centers for Disease Control (CDC) guidance related to masking and physical distancing while in covered contractor workplaces (including masking in areas with high or substantial transmission, regardless of vaccination status, and indoor and crowded-outdoor spaces masking for unvaccinated people).
- / All covered contractors must designate a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

Who is considered a “covered contractor or subcontractor”?

The Executive Order requires that all federal departments and agencies include in their contracts a clause specifying that, for the duration of the contract, the contractor or subcontractor will comply with the Guidance (and any updates thereto) and incorporate a similar clause requiring the same in any lower-tier contracts. For this purpose, federal contracts are defined broadly to include any contract or contract-like instrument creating obligations that are enforceable or otherwise recognizable at law (including construction contracts, lease agreements, provider agreements, service agreements, licenses, and permits). Any entity subject to any of these contracts, accordingly, would be considered a “covered contractor or subcontractor,” regardless of size (i.e., including small businesses), except for contracts under the simplified acquisition threshold (presently contracts under \$250,000), “contract[s] and subcontract[s] for the manufacturing of products,” and subcontracts “solely for the provision of products.”

Federal contractors and subcontractors should review each federal contract on a case-by-case basis to verify its nature and determine whether the contract is subject to the Guidance’s requirements.

Does the Guidance apply to all employees of the federal contractor or subcontractor or just employees who are actually providing services pursuant to the covered contract?

All employees of a federal contractor or subcontractor regardless of size, including small businesses, are covered by the Guidance, if they (i) are located in the United States and (ii)

perform work in or at the same location as at least some of the employees actually providing services pursuant to or in connection with the covered contract (including at any federal agency or workplace). To be sure, “in connection with” a covered contract includes those employees performing duties necessary to the performance of the covered contract, but who are not directly engaged in performing the specific work called for by the contract (e.g., human resources and billing and legal department employees). Meaning, that if, for example, a covered contractor or subcontractor’s human resources personnel are centralized at a location separate and apart from any employee(s) providing services for a covered contract, all of the human resources employees and any other employee(s) at the same location as the human resources employees are subject to the Guidance’s requirements. Moreover, even remote employees who work on or in connection with a covered contract or subcontract are covered by the Guidance.¹ (Note, these requirements are in addition to any requirements and/or workplace safety protocols that are [applicable to federal employees](#).)

What is the timing of the required compliance clause?

The compliance clause is required for:

- / All federal contracts *solicited* on or after October 15 and *awarded* on or after November 14.
- / All contracts *awarded before* October 15 under which performance is ongoing AND an option is exercised **or** an extension is made.

If neither of these has happened, then the contract remains as it was when signed—and the compliance clause is not required until one of these two triggering events occurs.

Between October 15 and November 15, contractors must include the clause in *solicitations*, but including the clause in the contract is encouraged, not required. Additionally, under the Guidance, agencies are “strongly encouraged” to incorporate the compliance clause into existing contracts prior to the date on which inclusion would be required and into contracts that may not be covered or directly addressed by the Guidance.

Who is charged with ensuring compliance with the requirements?

Covered contractors are responsible for ensuring that employees comply with the Guidance and with any agency COVID-19 workplace safety requirements while in Federal workplaces. Failure to adhere to the requirements would be considered a breach of contract and could result in the loss of the contract, contractual damages, and/or other penalties.

¹ Note that, although these remote workers must be vaccinated, a remote worker’s home is not considered a covered workplace under the Guidance—in other words, the remote worker is not subject to the Guidance’s other requirements like physical distancing and mask-wearing.

The definition of fully vaccinated seems different depending on the context or rule. Does the Guidance provide a definition for “fully vaccinated”?

Yes. The Guidance provides that individuals are considered “fully vaccinated” two weeks after they have received either the second dose of a two-dose series or the first dose of a single-dose vaccine. Approved vaccines under the Guidance include the Pfizer-BioNTech, Moderna, Johnson & Johnson [J&J]/Janssen, AstraZeneca/Oxford, and Novavax vaccines. Note that, if the CDC later determines that there is a time limit on what is required to be considered “fully vaccinated” (or a further booster shot is required), the requirements in the Guidance may be updated.

Is there specific documentation of vaccine status that is required to be viewed or maintained?

Under the Guidance, acceptable documentation of vaccination status includes the vaccination record from a healthcare provider or pharmacy, the CDC vaccination card, any medical records documenting the vaccine, any immunization records from a public health or state immunization information system, or any other official documentation verifying vaccination status (including copies or digital copies of any of the above).

Contractors who are covered by the Guidance must review each covered employee’s documentation of vaccination, but they are not required to keep copies. If contractors elect to do so, in accordance with Equal Employment Opportunity Commission (EEOC) guidance, they must maintain the confidentiality of such documentation and keep it separate from the employee’s personnel file, consistent with the recordkeeping requirements under the ADA for confidential medical information.

There are lots of masks. Does the Guidance say which masks are required or permitted?

Yes. Under the Guidance, the only acceptable masks are those consistent with CDC recommendations—which do not include masks with exhalation valves, vents, or other openings; face shields only (without mask); or masks with single-layer fabric or thin fabric that does not block light. Covered employers should communicate to their workforce which masks are acceptable and which are not.

Are visitors to covered workplaces subject to any requirements?

Visitors under the Guidance are required to comply with published CDC guidance for masking and physical distancing at any covered contractor workplace. Contractors accordingly should post signs at all entrances informing visitors of the requirements for vaccinated and unvaccinated people in that workplace.

As an employer subject to different mandates (e.g., state laws, Occupational Safety and Health Administration's (OSHA's) forthcoming emergency temporary standard (ETS), etc.), how do I know which mandates must be followed?

The Guidance supersedes contrary state and local laws and ordinances, but does not excuse noncompliance with *more* protective workplace safety protocols. So, if a law, order, rule, regulation, ordinance (or even a private company policy) requires, for example, more precautions, earlier vaccination, or more rigorous safety protocols, individuals remain subject to such requirements. The flip side, however, is that if there is a mandate that is less restrictive that might otherwise apply to a covered contractor, the contractor must follow the Guidance and not the less restrictive mandate.

For example, contractors with more than 100 employees presumably will be covered by the forthcoming OSHA ETS, which likely will provide a mechanism for unvaccinated employees to be tested for COVID-19 weekly in lieu of vaccination. Covered federal contractors, however, would not be permitted to provide that option to their employees (except perhaps those eligible for a medical or religious exemption) because the Guidance is more restrictive than that expected from the coming ETS.

Our Nixon Peabody team will continue to monitor this Guidance and other COVID-19 developments and provide updates on other issues facing employers and solutions to assist them in navigating these turbulent times.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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