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Editor's Note: Task Force Guidance Victoria Prussen Spears	391
Safer Federal Workforce Task Force Issues COVID-19 Workplace Safety Guidance for Federal Contractors and Subcontractors Jessica C. Abrahams, Lindsey M. Hogan, Kristin Jones Pierre, Grayson F. Harbour, and Graciela (Grace) Quintana	394
Hunting Telehealth Fraud Under COVID-19 Waivers and Expansion Stephen D. Bittinger, Kim H. Looney, and Nora E. Becerra	400
FAR Conformed to the "New" Limitations on Subcontracting Methodology at 13 C.F.R. § 125.6 Amy Laderberg O'Sullivan, Olivia L. Lynch, Michael E. Samuels, and Zachary Schroeder	410
Biden Administration Continues Taking Action to Strengthen U.S. Supply Chains Jamieson L. Greer, Christine E. Savage, Christopher Hyner, and Adam Harper	415
Justice Department Rescinds Brand Memorandum, Reopens the Door to False Claims Act Actions Based on Sub-Regulatory Guidance John P. Elwood and Christian D. Sheehan	419
D.C. Circuit Court of Appeals Revives Medicare Advantage Overpayment Rule Barak A. Bassman, Virginia Bell Flynn, Judith L. O'Grady, Leah Greenberg Katz, and Sara B. Richman	423

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Safer Federal Workforce Task Force Issues COVID-19 Workplace Safety Guidance for Federal Contractors and Subcontractors

*By Jessica C. Abrahams, Lindsey M. Hogan, Kristin Jones Pierre, Grayson F. Harbour, and Graciela (Grace) Quintana**

The Safer Federal Workforce Task Force issued COVID-19 workplace safety guidance implementing President Biden's Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors. The authors of this article discuss the Guidance, which sets forth three main requirements: a vaccination requirement for employees of covered contractors; masking and physical distancing requirements in workplaces of covered contractors; and a requirement to designate a person or persons to coordinate and implement COVID-19 workplace safety efforts.

The Safer Federal Workforce Task Force¹ (“Task Force”) has issued COVID-19 workplace safety guidance² (“Guidance”) implementing President Biden’s Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors³ on September 24, 2021. The Guidance sets forth three main requirements: a vaccination requirement for employees of covered contractors; masking and physical distancing requirements in workplaces of covered contractors; and a requirement to designate a person or persons to coordinate and implement COVID-19 workplace safety efforts.

Most notably, the Guidance requires agencies—beginning November 14—to include a clause in certain federal contracts mandating that the federal

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¹ <https://www.saferfederalworkforce.gov/>.

² https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf.

³ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>.

contractors ensure all employees working on or in connection with those contracts, or working at the contractors' workplaces, are fully vaccinated against COVID-19. Covered contractors with new or newly revised contracts must ensure their employees are fully vaccinated by December 8, 2021, and for contracts that are new or revised following that date, employees must be fully vaccinated by the first day of the period of performance of the new contract.

CONTRACTORS IMPACTED BY PRESIDENT BIDEN'S EXECUTIVE ORDER

President Biden's Executive Order requires certain government contracts and contract-like instruments to include a clause that the contractor and any subcontractor (at any tier) must incorporate into lower-tier subcontracts. The clause requires the contractor or subcontractor to comply with the Guidance issued by the Task Force.

The Guidance applies to "covered contractors"—prime contractors or subcontractors at any tier who are parties to the following federal contracts:

- Procurement contracts for services, construction, or a leasehold interest in real property;
- Contracts for services covered by the Service Contract Act;
- Contracts for concessions; and
- Contracts in connection with federal property or lands and related to offering services for federal employees, their dependents or the general public.

The prime contractor will be responsible for ensuring that the required clause is incorporated into its first-tier subcontracts. When the clause is incorporated into a subcontract, a subcontractor is required to comply with the Guidance and the workplace safety protocols.

Additionally, first-tier subcontractors are expected to flow the clause down to their lower-tier subcontractors in similar fashion so that accountability for compliance is fully established throughout the federal contract supply chain for covered subcontractor employees and workplaces at all tiers. The Guidance would seem to cover subcontracts that are not "solely for the provision of products."

The Guidance does not apply to grants, contracts with Indian Tribes under the Indian Self-Determination and Education Assistant Act, contracts or subcontracts whose value is equal to or less than the Simplified Acquisition Threshold (\$250,000 for most contracts), employees who perform work outside the United States, or subcontracts solely for the provision of products.

Although supply contractors may breathe a sigh of relief that they are not specifically listed as being included in President Biden's Executive Order, the

Guidance leaves the door open for agencies to extend the vaccine mandate. The Guidance “strongly encourages” agencies to incorporate a clause requiring compliance with the Guidance into contracts that are not covered or directly addressed by President Biden’s Executive Order, including a “contract or subcontract for the manufacturing of products” and contracts below the Simplified Acquisition Threshold.

IMPLEMENTATION TIMELINE

The Guidance applies to new contracts awarded on or after November 14. Between October 15 and November 14, agencies had to include the clause in solicitations of new contracts. Agencies were also “strongly encouraged” to include the clause in contracts awarded during this time period but were not required to do so unless the solicitation for the contract was issued on or after October 15.

VACCINATION REQUIREMENTS FOR COVERED CONTRACTORS

The Guidance requires that all covered contractors ensure that all “covered contractor employees” are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation. Employees of covered contractors with new or newly revised contracts must be fully vaccinated by December 8, 2021. Employees of covered contractors with contracts that are new or revised following that date must be fully vaccinated by the first day of the period of performance of a new contract.

The guidance’s definition of a “covered contractor employee” is quite broad: it includes any full-time and part-time employee of a covered contractor (1) working on or in connection with a covered contract, or (2) working at a covered contractor workplace. The Guidance explains that employees perform work “in connection with” a covered contract when they perform duties necessary to the performance of the covered contract, such as human resources, billing, and legal review, rather than duties directly engaged in performing the specific work called for by the covered contract. The Guidance also specifies that remote employees who work on a covered contract from their homes must comply with the vaccination requirement, even if the employees never work at a covered contractor workplace or federal workplace during the performance of the contract.

Furthermore, the Guidance defines “covered contractor workplace” broadly to dramatically expand the vaccination requirements beyond only those employees directly or indirectly servicing the federal contract.

Specifically, the Guidance states that a “covered contractor workplace” is a location controlled by the contractor at which an employee working on or in connection with a covered contract is likely to be present during the period of performance for the contract.

Therefore, employees who do not work on or in connection with a covered contract are still subject to the vaccination requirement if they work in a location where employees who are servicing a federal contract are also present unless a covered contractor can demonstrate that it meets an extraordinarily difficult hurdle of essentially isolating all employees who work on or in connection with the federal contract.

The Guidance explains that it applies to both indoor and outdoor contractor workplace locations and to the contractor's entire building or campus. Accordingly, even if employees who are working on or in connection with a federal contract perform their duties on a separate floor of a contractor-controlled building—or in a separate building on a contractor-controlled campus—the other areas of the building or campus are considered a covered contractor workplace.

If a contractor can affirmatively determine, however, that none of its employees on separate floors or in separate buildings will come into contact with an employee working on or in connection with a federal contract, then those areas do not constitute a covered contractor workplace. Contact is specifically described as including interactions through use of common areas, such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.

VACCINATION EXCEPTION REQUESTS

Contractors may provide accommodations to employees who are not vaccinated against COVID-19 or cannot wear a mask because of a disability (including medical conditions) or because of a sincerely held religious belief, practice, or observance. Covered contractors are responsible for considering their employees' requests for an accommodation and what, if any, accommodation they must offer, regardless of the locations of the employees' places of performance.

A rare temporary exception may also exist if a federal agency has "an urgent, mission-critical need" for a contractor to have an employee begin work on a covered contract or at a covered contractor workplace before becoming fully vaccinated. In these cases, the agency head may approve an exception for the covered contractor.

The contractor must ensure, however, that the employee is fully vaccinated within 60 days of beginning work on a covered contract or at a covered workplace. The contractor must also ensure that the employee complies with masking and physical distancing requirements for not fully vaccinated individuals in covered workplaces before the employee is fully vaccinated.

In contrast to earlier requirements, the Guidance does not offer an exception for unvaccinated employees if they wear a mask at work and submit to weekly testing.

VACCINATION LOGISTICS AND PROOF OF VACCINATION

Contractors should post signage at covered contractor workplaces that conveys the protocols for both vaccinated and not fully vaccinated individuals. Contractors should also make their employees aware of convenient opportunities to be vaccinated,⁴ but they are not required to host onsite vaccination clinics.

Importantly, covered contractor employees who have had a prior COVID-19 infection are still required to be vaccinated. Antibody tests are not an acceptable substitute to vaccination.

Covered contractors must ensure that employees comply with the vaccination requirements by showing or providing proper vaccination documentation. Acceptable documentation includes a copy of the employee's 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 or state immunization information system; or any other official documentation verifying vaccination with the vaccine name, date of administration and name of health care professional or clinic site administering the vaccination.

Contractors may allow employees to show digital copies of these records. Notably, attestation is not an acceptable substitute for documentation of proof of vaccination.

MASKING AND PHYSICAL DISTANCING REQUIREMENTS IN COVERED CONTRACTOR WORKPLACES

The Guidance also requires covered contractors to ensure that all individuals, including covered contractor employees and visitors, comply with published Centers for Disease Control and Prevention ("CDC") guidance for masking and physical distancing at a covered contractor workplace. Fully vaccinated people must wear a mask in indoor settings in areas of high or substantial community transmission but not in areas of low or moderate community transmission. Fully vaccinated people do not need to physically distance, regardless of the area's transmission levels.

Individuals who are not fully vaccinated must wear a mask indoors and in crowded outdoor settings or during certain outdoor activities. Individuals who

⁴ <https://www.vaccines.gov/>.

are not fully vaccinated must also maintain a distance of at least six feet from others at all times, including in offices, conference rooms, and all other communal and work spaces.

Covered contractors must ensure that individuals in covered contractor workplaces who are required to wear a mask do so consistently and correctly. But contractors can provide for exceptions to mask wearing and/or physical distancing requirements consistent with CDC guidelines, such as when an individual is alone in an office that is completely enclosed.

Contractors must check the CDC COVID-19 Data Tracker County View⁵ website weekly for community transmission information in all areas where they have a covered contractor workplace. When the level of community transmission increases to substantial or high, covered contractors and subcontractors should put in place more protective workplace safety protocols consistent with published guidelines. Community transmission levels must remain at a lower level for at least two weeks before the covered contractor uses protocols recommended for areas of moderate or low community transmission.

DESIGNATED COORDINATOR(S) OF COVID-19 WORKPLACE SAFETY EFFORTS AT COVERED CONTRACTOR WORKPLACES

The Guidance further requires covered contractors to designate a person or persons to coordinate the implementation of the workplace safety protocols set forth by the guidance. The coordinator must ensure that information on the required workplace safety protocols is provided in a readily understandable manner to covered contractor employees and all other individuals likely to be present at covered contractor workplaces.

⁵ <https://covid.cdc.gov/covid-data-tracker/#county-view>.