

HR Compliance Consulting

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Feds issue guidance on vaccine mandate for covered federal contractors

On Sept. 24, 2021, the Safer Federal Workforce Task Force issued [guidance](#) addressing President Biden's Executive Order 14042 ("Order"), which imposes vaccine mandates on certain federal contractors and subcontractors (collectively referred to as "contractors"). We now know that covered contract employees will have until Dec. 8, 2021, to be fully vaccinated. In addition to this vaccine mandate, the guidance identifies other workplace safety measures covered employers must undertake. Key takeaways, details and next steps are identified below.

Key takeaways

- The mandate and related safety protocols only impact certain new federal contracts. Existing contracts would need to be modified for the mandate to apply.
- Employees of a covered federal contractor working in a covered contractor workplace may be subject to the vaccine mandate even if they don't work on the contract or in connection with the contract.
- Accommodations under the Americans with Disabilities Act (ADA) and Title VII should be afforded to employees with qualifying objections to the vaccine mandate and mask requirement.
- The Order and related guidance supersede any state or local laws to the contrary.

Which federal contracts are covered?

Only federal contracts including the vaccine mandate and related workplace safety protocols are covered. This means that only *new* contracts awarded on or after Nov. 14, 2021, will be subject to the requirements. For contracts awarded between Oct. 15 and Nov. 14, federal agencies are encouraged to include these requirements. For contracts awarded before Oct. 15, in which performance is ongoing, compliance is not required until the terms of the Order are incorporated once an option is exercised, or an extension of the contract is made. Prime contractors will be responsible for ensuring the required contract clause is incorporated in first-tier subcontracts and subcontractors will be expected to flow the clause down to any lower-tier subcontractors.

Not every federal contract falls within the scope of the guidance. The requirements do not apply to:

- Contracts and subcontracts below the simplified acquisition threshold of \$250,000
- Contracts and subcontracts solely for products
- Employees who perform work outside of the United States
- Contracts or agreements with Indian Tribes

Even so, the guidance strongly encourages agencies to incorporate similar vaccine requirements into non-covered contracts.

Lockton comment: If your current federal contracts do not fall within the scope of the Order, be aware that the agency with which you contract may add this provision in the future.

How is a covered contractor workplace defined?

A covered contractor workplace is broadly defined in the guidance as, “a location controlled by a covered contractor at which any employee of a covered contractor working on or *in connection with* a covered contract is *likely to be present* during the period of performance for a covered contract.” Even employees, such as those in human resources, billing and legal review, who are not directly engaged in performing the work contracted for but are performing duties necessary to the performance of the covered contract, are performing work “in connection with” the contract and, therefore, covered. This includes full-time, part-time and remote employees.

Generally, the covered contractor’s entire work site (which includes outdoor work sites) will be considered a “covered contractor workplace” even though covered contractors may work in a single department. To avoid this determination, a covered contractor must be able to demonstrate that none of its employees on another floor or in separate areas of the building or work site will have contact with a covered contractor employee during the contract period. This means that a covered contractor cannot interact with other employees at the work site through the use of common areas including lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas and parking garages. The same analysis applies even if a covered contractor employee performs their duties in a particular building, site or facility on a campus controlled by a covered contractor.

Lockton comment: It may be difficult for covered contract employers to have covered contract employees isolated enough from other employees to ensure there is no interaction. A covered contractor’s determination of the absence of contact could be subject to scrutiny and should be well documented in the event all employees are not subject to a vaccine mandate. Mandating the vaccination for all employees regardless of their work on or in connection with a federal contract would be an option to alleviate this problem.

While remote workers working on a covered contract are subject to the vaccine mandate, their personal residence is not considered a covered contractor workplace.

What are the important details about the vaccine mandate?

Covered contract employees (including those working solely remote) must be fully vaccinated by Dec. 8, 2021 (absent an entitlement to an accommodation). For contracts effective after this date, all covered contract employees must be fully vaccinated by the first day of performance on newly awarded covered contracts as well as any existing contracts incorporating this clause whether through option, extension or renewal.

The guidance recognizes that accommodations may be required for covered contract employees with a medical reason for not being vaccinated or a religious objection to the vaccine. The covered federal contractor is responsible for the accommodation process. If the agency that is a party to the covered contract is a “joint employer,” both parties should review and consider appropriate accommodations.

Lockton comment: The guidance does not identify what reasonable accommodations an employer may offer to employees asserting a valid medical reason for not being vaccinated or a religious objection to the vaccine. It may be reasonable for employers to permit masking and social distancing

as a reasonable accommodation. The guidance is void of any discussion or mention of weekly COVID-19 testing.

Covered contract employers must verify the vaccination status of covered employees and may do so by reviewing a copy of any one of the following:

- The record of immunization from a healthcare provider or pharmacy
- The COVID-19 vaccination record card
- Medical records documenting the vaccination
- Immunization records from a public health or state immunization information systems
- Any other official documentation verifying vaccination with information on the vaccine names, date(s) of administration, and the name of the healthcare professional or clinic site administering the vaccine

Covered contract employees may also provide a digital copy (e.g., digital photograph, scanned image or PDF) of any of these records. The guidance is clear that an attestation alone is not an acceptable method to confirm vaccination status and that covered contract employees will not avoid the vaccine mandate simply because they've had a prior COVID-19 infection or a recent antibody test.

Given that the COVID-19 vaccine is widely available, covered contract employers are not required to offer on-site vaccine clinics but should let employees know where they can go to be vaccinated. See [vaccines.gov](https://www.vaccines.gov).

What other safety protocols are required?

Masking and physical distancing while in a covered contractor workplace

In addition to the vaccine mandate, covered contractors are required to ensure all individuals – not just covered contract employees – comply with CDC guidance for masking and physical distancing at a covered contractor workplace. This includes CDC site-specific guidance. The obligations of a covered contractor are tied to levels of community transmission. Workplace safety protocols must be consistent with CDC guidelines and may fluctuate accordingly, but protocols cannot be reduced absent at least two consecutive weeks of reduced community transmission. Covered contractors are required to check the [CDC's COVID-19 Data Tracker County View website](#) at least weekly to determine proper workplace safety protocols. A covered contractor may need to accommodate an employee's objection to wearing a mask if on account of a medical reason or religious objection. Remote employees are not subject to masking and social distancing requirements.

Designating a COVID-19 workplace safety coordinator

While the guidance is devoid of any information on how the Order will be enforced and what, if any, sanctions may issue for noncompliance, it does require covered contractors to designate one or more persons to coordinate COVID-19 workplace safety efforts. The selected individual can be someone already charged with COVID-19 safety related responsibilities in the workplace.

The responsibilities of this coordinator include ensuring that covered contractor employees have verified their vaccination status and ensuring covered contract employees and other individuals likely to be present at the workplace are provided with information on required COVID-19 workplace safety protocols.

The Order preempts state laws and local ordinances that attempt to prohibit compliance

The guidance is clear that covered contractors are required to comply with the Order despite the existence of any contrary state law or local ordinance. However, to the extent a state or locality imposes more protective workplace safety protocols than the guidance, the more expansive protocols must be followed.

What steps should a federal contractor take now?

The first step is to determine whether you are a covered federal contractor and, if so, whether your entire workforce will fall within the vaccine mandate. Once confirmed:

- Designate a COVID-19 workplace safety coordinator
- Communicate with your employees if your workforce is not currently subject to a vaccine mandate
- Develop a process for collecting vaccination information from covered contract employees
- Prepare for accommodation requests and the interactive process if the vaccine mandate will be new

Conclusion

Many of you may be private employers with 100 or more employees and also federal contractors. The guidance related to the Order is clear that the federal contractor vaccine mandate applies regardless of other workplace safety standards – including the Emergency Temporary Standards (ETS) yet to be issued by OSHA. Be assured, we will issue an alert with the details of the ETS once available.

Should you have questions in the meantime, please contact your Lockton account team.

Paula Day, JD

Vice President, Director, HR Compliance Consulting

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Lockton Benefits | 444 West 47th Street | Suite 900 | Kansas City | MO | 64112
