SAFER FEDERAL WORKFORCE TASK FORCE RELEASES VACCINE REQUIREMENTS FOR FEDERAL CONTRACTORS

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U.S. Government Contracts and Procurement Policy, Labor Employment, and Workplace Safety Alert

As we wrote on 10 September 2021, the President, as part of the Administration's comprehensive national strategy, issued Executive Order 14042 (the EO) directing the Safer Federal Workforce Task Force (Task Force) to publish guidance by 24 September 2021 regarding COVID-19 safeguards applicable to prime contractors and subcontractors working on or in connection with a federal contract or a contract-like instrument, including those for commercial items (the Guidance).

On 24 September, 2021, the Task Force published its Guidance. The Guidance imposes a vaccine mandate and Centers for Disease Control and Prevention (CDC) workplace safety measures on the employees of nearly all government prime contractors and subcontractors performing service or construction contracts above the simplified acquisition threshold, even if an employee works remotely and does not go into the office. Unlike the OSHA emergency temporary standard aimed only at employers with 100 or more employees, the Guidance requirements apply to small businesses and regardless of headcount. Moreover, the Guidance "strongly encourages" agencies to apply the requirements to contracts not explicitly covered by the EO. Once implemented into covered contracts, prime and subcontractors will need to comply with these requirements for the entire contract lifecycle, including all option and extension periods. Further, any new guidance issued by the Task Force will be incorporated by reference through these contract clauses and will automatically apply to covered contractors. The Guidance is sweeping and will have a profound impact on prime and subcontractors alike in contract performance and costs, contract administration, and compliance burdens and risk. This alert discusses the scope and impact of the new Guidance.

WHO IS COVERED?

- The guidance applies to service and construction contracts, and may apply more broadly at an agency's discretion. The Guidance, like the EO, broadly defines a "covered contract" as any CONUS[1] contract or contract-like instrument for services, construction, property management or leases, and concessions. In addition the Guidance further recommends that agencies implement the Guidance in contracts and contract-like instruments that are not covered by the EO, such as procurements below the simplified acquisition threshold, those for supplies/products, and for contracts and contract-like instruments in existence before 15 October 2021.
- A covered contractor must flow the requirements down to subcontractors at all tiers except for subcontractors solely for the provision of products. The Guidance applies to covered contractors and their employees. The Guidance defines a "covered contractor" as any "prime contractor or subcontractor at any

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tier who is a party to a covered contract," and requires that its mandates be flowed down to subcontracts at any tier unless the subcontract is solely for the provision of products.

- The requirements apply to employees working directly or indirectly on a federal contract, as well as all employees who share a workplace location with employees working directly or indirectly on a federal contract. If a prime contractor or subcontractor, regardless of size, has one or more covered contracts, all "covered contractor employees" will be subject to a COVID-19 vaccine mandate and CDC workplace safety protocols for masking and social distancing. The Guidance defines a "covered contractor employee" as "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" or remotely, as well as any "employees who are not themselves working on or in connection with a covered contract," but who will be present at a covered contractor's workplace. A "covered contractor workplace" is defined as any "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" (which includes all buildings, sites (including outdoor sites) or facilities to which a covered contractor employee has access),[2] while the phrase "in connection with" is broadly defined as any "duties necessary to the performance of [a] covered contract . . . such as human resources, billing, and legal review . . . ." Accordingly, any employee who is a direct or indirect charge on a covered contract, regardless of work location, and any employees who work at the contractor's workplace (even if they do not directly or indirectly support a covered contract) will be subject to the Guidance mandates.
- The requirements apply to remote employees who work directly or indirectly on a federal contract. The Guidance FAQs confirm that "[a]n individual working on a covered contract from their residence is a covered contractor employee, and must comply with the vaccination requirement for covered contractor employees, even if the employee never works at either a covered contractor workplace or Federal workplace during the performance of the contract." However, work-from-home employees will not need to mask or social distance while at home.

WHAT ARE THE REQUIREMENTS?

- Contractor employees covered by the Guidance must be fully vaccinated for COVID-19, with limited exemptions. Unless an accommodation applies, covered contractors are required to have their employees vaccinated for COVID-19. The burden will be on the contractor to review its employees' vaccination documents to prove their vaccination status. The Guidance allows contractors to determine (in accordance with internal policies and processes) and assert a legally required accommodation request on behalf of an employee based on a disability, medical condition, or a sincerely held religious belief, practice, or observance.
- Contractor employees and other individuals at a covered workplace must comply with CDC guidelines. In addition to the vaccine mandate, the Guidance requires that all individuals at the contractor's workplace, whether or not an employee, comply with all applicable CDC guidelines and exceptions regarding masking and social distancing depending on the individual's vaccination status (full, partial, or none) and the nature of the transmission zone (high, moderate, or low risk) in which the individual may be present.

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- Contractors must designate a person or persons to coordinate implementation of the Guidance. The Guidance requires covered contractors to have one or more designated persons responsible for implementing, communicating, and monitoring compliance with all Guidance requirements at the workplace. These may be the same individual or individuals responsible for implementing any supplemental federal, state, or local COVID-19 safety requirements, and their duties as designees may comprise some or all of their job duties.

WHEN MUST COVERED CONTRACTORS COMPLY?

- Agencies must implement the requirement during the exercise of options and extensions beginning on 15 October, and in new contracts beginning 14 November, but may do so sooner at their discretion. The Guidance states that the clause implementing these requirements shall be inserted into federal contracts according to the following schedule:
- Beginning 15 October 2021, agencies must include the requirements when exercising options or extensions for previously-awarded covered contracts.
- Beginning 14 November 2021, agencies must include the new requirements in new covered contracts.
- For solicitations for covered contracts issued between 15 October 2021 and 14 November 2021, agencies must include the new requirements in the solicitation.
- For covered contracts awarded between 15 October 2021 and 14 November 2021, agencies are strongly encouraged to include the requirements but need not do so unless the solicitation was issued on or after 15 October 2021.
- Additionally, agencies are "strongly encouraged to incorporate a clause requiring compliance with [the] Guidance into existing contracts and contract-like instruments prior to the date upon which the order requires inclusion of the clause."
- Covered employees must be vaccinated by 8 December 2021. The Guidance states that except for those employees entitled to an accommodation, all covered contractor employees must be fully vaccinated by the later of 8 December 2021 or the first day of performance on a newly-awarded contract or on an exercised option or extension period under an existing contract that includes the mandated FAR clause. However, if an agency has an "urgent, mission-critical need for a covered contractor to have covered contractor employees begin work on a covered contract or at a covered workplace before becoming fully vaccinated," the agency head may grant the contractor a limited exception of 60 days from the start of performance to have its employees fully vaccinated. Masking and social distancing requirements will still apply.

INDUSTRY IMPACT

The Guidance will impact nearly all government prime contractors performing service or construction contracts above the simplified acquisition threshold, regardless of the company's size. Because the Guidance includes a directive to flow these requirements down to lower-tier subcontractors, the Guidance will impact a federal

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contractor's supply chain as well. Moreover, because the Guidance encourages agencies to impose the Guidance requirements in contracts that are not explicitly covered by the Guidance, its impacts could be even broader.

Our Government Contracts and OFCCP practices can help federal contractors and their supply chains understand the new obligations and risks that will emerge as a result of this Guidance.

FOOTNOTES

[1] The Guidance exempts covered contractor employees who only perform work outside of the United States or its outlying areas.

[2] The Guidance also applies to any covered contractor employees performing work at a Federal workplace, and such employees must further comply with any additional agency requirements.

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