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Navigating the Federal Contractor COVID-19 Vaccine Mandate and Workplace Safety Protocols

*By Kristen E. Ittig, Joshua F. Alloy and Thomas A. Pettit**

The authors of this article discuss the Safer Federal Workforce Task Force guidance, which includes vaccine mandates for government contractors and subcontractors, and more.

President Biden issued an executive order on September 9, 2021 charting a path for implementing COVID-19 safeguards for government contractors (“EO”). The first step in that process was for the Safer Federal Workforce Task Force (“Task Force”) to issue guidance approved by the Director of the Office of Management & Budget (“OMB”). On September 24, 2021, pursuant to that directive, the Task Force issued extensive guidance (“Guidance”),¹ which includes vaccine mandates for government contractors and subcontractors.

Although the guidance resolves several lingering questions, others remain and will presumably be addressed through implementing regulations issued by the Federal Acquisition Regulation (“FAR”) Council and agency-specific clauses for contracts and contract-like instruments not covered by the FAR.

APPLICABILITY

Vaccine Mandate v. Other Safeguards

Perhaps most significantly, the vaccine mandate is employee specific while other safeguards (i.e., masking and social distancing) are workplace-specific. The vaccine mandate applies to all covered contractor employees—including those who work remotely.² The other safeguards apply only to covered

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¹ https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf.

² Guidance at 5 (“Covered contractors must ensure that all covered contractor employees are

contractor workplaces and do not extend to personnel working remotely.³ However, those other safeguards apply to all persons in covered contractor workplaces—including persons who are not employees and do not support government contracts.

Covered Contracts

The Guidance adopts the EO’s definitions of covered contracts. However, the Guidance provides clarity on the timing. The safeguards must be incorporated into solicitations for covered contracts issued after October 15, 2021 and into new covered contracts issued on or after November 14.⁴ The Guidance also makes clear that these safeguards must be flowed down to all subcontracts at all tiers of the supply chain unless the subcontracts are solely for products.⁵

Covered Contractor Employees

Persons are covered contractor employees if they (1) work on or in connection with a covered contract (even if they work remotely) or (2) work at a covered contractor workplace. In other words, the Guidance applies to all employees who work at a worksite where work is performed on a covered contract, even employees who do not themselves work on or in connection with the contract.⁶ Covered contractor employees do not include independent contractors, visitors, or employees of third parties that are not subcontractors supporting covered contracts, though the Guidance encourages contractors to extend requirements to such persons.⁷

fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation.”); *id.* at 11 (Q 11: How does this Guidance apply to covered contractor employees who are authorized under the covered contract to perform work remotely from their residence? A. An 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.”).

³ *Id.* at 6–7 (imposing mask and social distancing requirements in covered contractor workplaces).

⁴ *Id.* at 11–12.

⁵ *Id.*

⁶ *Id.* at 3–4 (emphasis added).

⁷ *Id.* at 6 (“Covered contractors are strongly encouraged to incorporate similar vaccination requirements into their non-covered contracts and agreements with non-covered contractors whose employees perform work at covered contractor workplaces but who do not work on or in connection with a Federal contract, such as those contracts and agreements related to the provision of food services, onsite security, or groundskeeping services at covered contractor workplaces.”).

Covered Contractor Workplaces

The safeguards apply to workplaces where even one employee “working on or in connection with a covered contract is likely to be present during the period of performance.”⁸ Employee residences do not constitute workplaces,⁹ but as explained above, vaccine mandates apply even to employees who work remotely on or in connection with a covered contract. The Guidance does not permit covered contractors to ease requirements in segregated areas that are not used by personnel who support government contracts unless the contractor can prove “that there will be no interactions between covered contractor employees and non-covered contractor employees in those locations.”¹⁰

Contracts With Independent Regulatory Agencies

We have received questions about whether the COVID-19 safeguards will apply to independent regulatory agencies and government corporations. The Guidance does not directly address this issue. However, the Guidance is fairly interpreted as applying to independent regulatory agencies but not to wholly owned or mixed-ownership government corporations. The EO and Guidance encompass “contracts and contract-like instruments” with “executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act (FPASA), 40 U.S.C. § 102(4)(A).”¹¹

FPASA broadly applies to executive agencies and legislative and judicial establishments other than Congress.¹² The term “executive agency” is broadly defined as “(A) an executive department or independent establishment in the executive branch of the Government; and (B) a wholly owned government corporation.”¹³ The EO’s reference to subsection (A) but not subsection (B) suggests that wholly owned government corporations (and mixed-ownership corporations, which have an even more attenuated relationship with the U.S. government and arguably fall outside the scope of the FPASA) are not required to comply with the safeguards. Notably, what constitutes an executive agency under the FPASA has been litigated on several occasions, with different tribunals reaching different conclusions.

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ *Id.* at 10.

¹¹ *Id.* at 1.

¹² 40 U.S.C. § 102(5).

¹³ *Id.* § 102(4).

Prime Contracts for Products

One gap in the EO is related to contracts for products. Although the EO exempted subcontracts for products, it was silent on prime contracts. The Guidance exempts “a contract or subcontract for the manufacturing of products,” including Federal Supply Schedule (“FSS”) contracts for supplies.¹⁴ Nevertheless, the Guidance encourages agencies to incorporate the safeguards into such contracts.

Contracts Performed Overseas

The Guidance, including the mandate, does not apply to personnel performing contracts entirely outside of the United States or its outlying areas. Contractors will likely face compliance challenges for contracts that are performed both domestically and overseas. For instance, covered contractors will need to assess whether an employee who is expected to work primarily overseas but is also likely to return to the United States or its outlying areas for some or all of the period of performance qualifies as a covered contractor employee at the outset of performance or only upon return to the United States or its outlying areas.

SAFEGUARDS

The Guidance establishes three general categories of safeguards: vaccine mandates, personal protective equipment (“PPE”) and social distancing, and designation of COVID-19 safety coordinators. Each is discussed in turn. Covered contractors should continue monitoring the Task Force for additional guidance, which may impose further requirements.

Vaccinations

As anticipated, the Guidance requires all covered contractor employees—regardless of work location—to be fully vaccinated.

Timing

All covered employees who are not entitled to legal accommodations must be fully vaccinated by December 8, 2021, or the first day of the period of performance on a newly awarded, exercised or renewed covered contract.¹⁵

Fully Vaccinated

A person is considered to be fully vaccinated two weeks after receiving (1) the second-dose of a two-dose vaccine (e.g., Pfizer-BioNTech and Moderna) or (2)

¹⁴ Guidance at 5.

¹⁵ *Id.*

a single-dose vaccine (e.g., Johnson & Johnson/Janssen).¹⁶ The Guidance does not require booster shots or set an end date for being fully vaccinated, though the Task Force may update the guidance in the future consistent with standards from the Centers for Disease Control and Prevention (“CDC”).¹⁷

Eligible Vaccines

To meet this mandate, the Guidance requires covered contractor employees to receive “COVID-19 vaccines currently approved or authorized for emergency use by the U.S. Food and Drug Administration” (“FDA”) or “listed for emergency use by the World Health Organization (“WHO”).¹⁸ Currently, the FDA-authorized vaccines are Pfizer-BioNTech, Moderna and Johnson & Johnson/Janssen.¹⁹

Proof of Vaccination

Covered contractor employees must prove that they are fully vaccinated.²⁰ Acceptable forms of proof are the COVID-19 Vaccination Record Card²¹ or other official documentation showing the vaccine name, date(s) of administration and the name of the provider (e.g., health care provider or pharmacy records, medical records or public or state immunization information system records).²² Records may be hard copy or digital and may be shown or provided to the employer.²³ Contractors should maintain secure and confidential records of compliance.

Disability and Religious Accommodations

The Guidance recognizes that certain employees may request to be “exempted” from vaccination due to a medical disability or a sincerely held religious belief, practice or observance, and that this request may trigger a legal obligation on the part of the employer to engage in a flexible, interactive process to evaluate whether there is a reasonable accommodation that could be offered

¹⁶ *Id.* at 4.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ COVID-19 Vaccines, FDA (last visited Sept. 25, 2021), <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-vaccines>. A list of WHO-authorized vaccines is *available at* <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/covid-19-vaccines>.

²⁰ Guidance at 5–6.

²¹ CDC Form MLS-319813_r.

²² Guidance at 6.

²³ *Id.*

without posing an undue hardship or a direct threat to the health and safety of the workforce. Unfortunately, the Guidance itself does not provide any further direction, and employers should consult with legal counsel and look to the Equal Employment Opportunity’s technical assistance questions and answers for additional guidance.

At a minimum, each contractor should explore:

- Whether an employee’s exemption request is legitimate and falls within a recognized disability (medical) or religious exemption;
- Whether any additional information or documentation is necessary to evaluate the request (i.e., medical documentation, or support for a sincerely-held belief or practice);
- Whether it would be an undue burden—too much of a health and safety risk—to allow an unvaccinated employee (or visitor) to access a worksite, even with a legitimate medical or religious exemption request; and
- Whether there are any reasonable accommodations that could be offered to the employee to allow them to perform the essential functions of their job (either remotely or in-person), including telework, frequent testing, additional health and safety measures, more stringent mask and PPE rules, limiting contact with other people, utilizing closed offices rather than open-space seating, reassignment, etc.²⁴

Natural Immunity

The term “natural immunity” in the context of COVID-19 refers to persons who have been infected with COVID-19 and have developed antibodies as part of their immune system response. Under the Guidance, natural immunity—even if proven through antibody testing—is not an acceptable alternative to vaccination.²⁵

²⁴ We note that an Emergency Temporary Standard was issued by the Occupational Safety and Health Administration (“OSHA”), requiring employers with 100+ employees to mandate vaccination or no less than weekly testing of employees. Accordingly, employers that choose to allow unvaccinated employees with valid medical/religious exemption requests to continue to work in person, should at a minimum, require weekly testing, in addition to taking other reasonable steps to ensure the health and safety of other employees in the workplace.

²⁵ *Id.* at 10 (“Q5: Are covered contractor employees who have a prior COVID-19 infection required to be vaccinated? A: Yes, covered contractor employees who have had a prior COVID-19 infection are required to be vaccinated.”).

Masks and Social Distancing

The Guidance requires covered contractors to enforce CDC masking and physical distancing guidance, including any enhanced requirements at specific facilities (e.g., healthcare, transportation, correctional and detention facilities and schools).²⁶ Unlike vaccinations, these safeguards are workplace specific and apply to all persons present in facilities—including persons who are not employees and who do not support covered contracts. The applicability of these safeguards varies based on whether persons are fully vaccinated and whether their workplaces are considered “areas of high or substantial community transmission.”²⁷ The CDC is responsible for defining community transmission and publishes that information on its website.²⁸ At present, more than 97 percent of jurisdictions in the United States are considered to have high or substantial transmission.

Masking and Distancing for Fully Vaccinated Persons

Persons who are fully vaccinated must, with certain exceptions wear masks when indoors in “areas of high or substantial community transmission” but not areas of low or moderate community transmission.²⁹ Fully vaccinated persons are not required to socially distance regardless of the level of community transmission.

Masking and Distancing for Non-Fully Vaccinated Persons

Persons who are not fully vaccinated must wear masks indoors or in outdoor settings that are crowded or require sustained contact with other persons who have not been fully vaccinated.³⁰ They must also socially distance regardless of the level of community transmission. Social distancing means “maintain[ing] a distance of at least six feet from others at all times, including in offices and conference rooms, and all other communal and work spaces.”³¹

Mask Standards

A person is considered masked when wearing an “appropriate mask” that consistently covers both the mouth and nose.³² The Guidance does not define what constitutes an “appropriate mask.”

²⁶ *Id.*

²⁷ *Id.*

²⁸ <https://covid.cdc.gov/covid-data-tracker/#county-view>.

²⁹ Guidance, *supra* n. 1.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

Accommodations and Exceptions

Similar to vaccinations, covered contractors will be required to consider reasonable disability and religious-based accommodations to masking requirements.³³ They may also provide limited exceptions to masking for covered contract employees in certain situations. For instance, mask requirements may be lifted when persons are “alone in an office with floor to ceiling walls and a closed door,” “when eating or drinking and maintaining appropriate distancing,” when masks may get wet, during “high intensity activities” when masks may make breathing difficult, for identification purposes, or under any circumstance where “a mask would create a risk to workplace health, safety, or job duty as determined by a workplace risk assessment” conducted in accordance with Department of Labor, Occupational Safety and Health Administration requirements.³⁴ All exceptions must be in writing and approved by an authorized representation of the covered contractor.

COVID-19 Coordinators

Covered contractors are required to have COVID-19 coordinators at each workplace who will be responsible for coordinating compliance with the Guidance at covered contractor workplaces. Duties include informing covered contractor employees and other persons likely to be present at covered contractor workplaces with protocols, including masking and social distancing and vaccination documentation.

IMPLICATIONS

Bid Protests

Compliance with workplace safety protocols is not likely to create significant bid protest risks. The U.S. Government Accountability Office and the Court of Federal Claims are likely to consider these issues to raise matters of responsibility or contract administration because contractors are not required to comply with these protocols until the first day of performance.

Cost Recovery

The workplace safety protocols may increase costs for covered contracts. Those costs could run the gamut and may include costs of additional workplaces, compensating covered contractor employees for time off to obtain the vaccines, costs for personal protective equipment (principally masks), and costs associated with ensuring and monitoring compliance. Covered contractors should anticipate these costs when developing bids and proposals, carefully

³³ *Id.*

³⁴ *Id.*, see also, <https://www.osha.gov/safety-management>.

track and segregate these costs, and as appropriate should submit seek additional compensation through contract modifications and requests for equitable adjustments under the applicable changes clause.

Performance Delays

The EO, Guidance and implementing regulations will impact contractor liability for alleged performance delays and other breaches of contracts stemming from COVID-19. We have seen contract disputes arise throughout the COVID-19 pandemic, and contractor theories have included invoking FAR 52.249-14, *Excusable Delays*. It may become more difficult for contractors to invoke this protection if delays could have been prevented through compliance with the workplace safety protocols, as the COVID-19 transmission may be viewed as preventable through compliance.

Liability for Subcontractor Compliance

Although the Guidance discusses flow-down requirements, it does not squarely address prime contractor and higher-tier subcontractor responsibility for ensuring subcontractor compliance. In general, prime contractors (which are the parties in privity with the government) and higher-tier subcontractors (through terms of subcontracts) may be held liable for subcontractor noncompliance. Covered prime contractors and subcontractors should consider how to structure subcontracts to mitigate risks of noncompliance at lower rungs of the supply chain, including through indemnification.

False Claims Act Liability

The False Claims Act (“FCA”) is one of the government’s principal and most powerful tools for enforcing contracts and penalizing contractors perceived as engaging in fraud. The FCA can impose severe financial liability, including trebling of the government’s damages and a penalty per false claim (e.g., per invoice). Covered contractors that make a knowing false representation of compliance with COVID-19 workplace safety protocols may face FCA liability.

POSTSCRIPT

Since this article was first written for publication, at least three courts have preliminarily enjoined enforcement of the EO 14042 vaccine mandate.³³ The most significant of these injunctions is the one issued in *Georgia v. Biden*, which

³³ *Louisiana v. Biden*, No. 21-cv-3867 (W.D. La. Dec. 16, 2021) (preliminarily enjoining enforcement only for covered contracts between the plaintiff states and the U.S. government and denying motion for injunction relating to contracts between private organizations and the U.S. government); *Georgia v. Biden*, No. 1:21-cv-163 (S.D. Ga. Dec. 7, 2021) (issuing comprehensive nationwide injunction against enforcement); *Kentucky v. Biden*, No. 3:21-cv-00055-GFVT

is a nationwide preliminary injunction prohibiting enforcement of the EO 14042 vaccine mandate with respect to any covered contracts. The crux of this injunction is that the court concluded President Biden exceeded his authority under the Federal Property and Administrative Services Act of 1949 (the “FPASA”). As a result, the federal government has announced it will take no action to enforce the requirements of EO 14042, absent further written notice. As long as enforcement remains enjoined, contractors must reconsider the impact of any state-level vaccine mandate prohibitions. Prior to the injunctions, contractors likely would have been protected through principles of federal preemption, but with enforcement enjoined, preemption will almost certainly not be a valid defense in any state enforcement action against company vaccine mandates.

(E.D. Ky. Nov. 30, 2021) (preliminarily enjoining enforcement in Kentucky, Tennessee, and Ohio).