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Understanding the Federal Contractor COVID-19 Vaccination Mandate

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Agenda

- Background
- Which Contracts are Covered?
- Contract Issues & Safeguarding Your Rights
- Which Employees are Covered?
- Other Requirements Under the Guidance
- Employer Policies & EEO Issues
- What is AGC of America Doing to Advocate for the Construction Industry?



Background

The Landscape

How We Got Here and Where We Are To-Date

- January 20: Safer Federal Workforce Task Force (“Task Force”) established (Inauguration Day)
- September 9: E.O. 14042 on Ensuring Adequate COVID Safety Protocols for Federal Contractors issued
- September 24: Task Force Guidance issued
- September 30: Federal Acquisition Regulation (“FAR”) Council establishes contract clause to be inserted into FAR contracts; GSA issues Class Deviation with FAR clause
- October 1: DoD, VA, DHS, NASA, and DOE issues Class Deviation

Executive Order 14042

Basic Provisions

- Requires incorporation of a contract clause mandating compliance with Safer Federal Workforce Task Force Guidance into certain contracts and “contract-like instruments” (broadly defined)
- Clause will apply to:
 - New contracts and contract-like instruments, new solicitations, and existing contracts under certain circumstances
 - Expressly states the types of contracts and contract-like instruments that are covered vs. excluded
 - Covers employees “working on or in connection with a Federal Government contract or contract-like instrument”
 - Extends to employees at “any covered workplace locations”
 - Flow-down requirement for subcontracts, at any tier, subject to exceptions

Safer Federal Workforce Task Force Guidance

Basic Provisions

- Requires:
 - Vaccination of covered contractor employees (subject to religious/medical exemption) by December 8th or by the 1st date of period of performance
 - Fully vaccinated = two weeks after final dose
 - No testing option
 - No end date identified
 - Designation of coordinator(s) for COVID-19 workplace safety efforts
 - Must actually review employee's proof of vaccination
 - Compliance with other safety requirements that extend to covered employees and visitors
 - Masking and physical distancing still required under certain circumstances

What Do the New Clauses Require?

FAR 52.223-99/ DFARS 252.223-7999

- Contractor must comply with:
 - E.O. 14042
 - Task Force Guidance, dated September 24, plus any future guidance issued on Task Force's website
- Contractors must flow-down the clauses to subcontractors, at all-tiers, subject to exceptions
- Agencies are issuing class deviations with instructions to contracting officers on how to implement

Which Contracts Are Covered?

Which Contracts Are “Covered”?

E.O. 14042’s Scope

- A contract/subcontract is “covered” if/when it incorporates the clause at either FAR 52.223-99 or DFARS 252.223-7999
- Incorporation is mandatory for:
 - New solicitations and contracts for **services**, including construction, (among others) awarded after **November 14, 2021**
 - Existing contracts for **services** that have an option exercised or are extended/renewed after **October 15, 2021**
- Incorporation is discretionary for:
 - Existing contracts for **services** and **products**, but “strongly encouraged”

Are There Any Exceptions to Incorporation?

E.O. 14042, Section 5(b) Exceptions

- Excluded Arrangements (*i.e.*, “shall not apply”):
 - **Subcontracts** “solely for provision of products” (e.g., Commercial Off-the-Shelf Item suppliers)
 - Contracts/subcontracts below the Simplified Acquisition Threshold (“SAT”) of \$250,000
 - Total value includes options
 - Employees that work outside of the U.S. and its outlying areas, as defined in FAR 2.101
 - Grants
 - Contracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act

Davis-Bacon Act Considerations

- Exclusion of **grant-funded / federal-aid** construction contracts, even when they are subject to the DBA prevailing wage requirements
- Contracts or contract-like instruments with federal government that are subject to the DBA prevailing wage requirements are covered contracts (including subcontracts under such federal contracts)
- Check the language in your contract for references to grants from federal agencies

How Are the Clauses Flowed-Down?

Flow-Down Framework

- Covered prime contractors and subcontractors are required to flow-down the clause to all subcontractors, at any tier, subject to exceptions
 - EX: Covered contractor has two subcontractors working under covered federal contract
 - Sub A provides hauling services; Sub B provides lumber without any services
 - Contractor must flow-down clause to Sub A's subcontract, and Sub A must flow-down requirement to any of its qualifying subcontractors
 - Contractor does NOT flow-down clause to Sub B
- NOTE: Agency class deviations appear to have slightly different guidance about subcontract flow-down requirements
 - “Contracts and subcontracts for the **manufacturing** of products” versus “subcontracts for the **provision** of products”

Contract Issues & Safeguarding Your Rights

Government Mechanisms for Incorporating the Clause

Modifying Existing Contracts

- The clauses can be incorporated into existing contracts
 - Via contract modification; OR
 - When the Government exercises an option or renews/extends the contract
- Class deviations provide that modification “shall” be bilateral
 - Refusal could result in a termination of the contract for the convenience of the Government under FAR 52.249-4
- Contractors should reserve their rights, in writing, to pursue an equitable adjustment for cost/schedule impacts
 - Best practice is to include the reservation in the contract mod. to avoid release

Which Employees Are Covered?

Which Employees Are Covered?

Two-Prong Analysis for Determining Who Is Covered

- “Covered contractor employees” are subject to the requirements, including mandatory COVID-19 vaccinations
- Two-prong analysis for determining who is “covered”
 - **Prong #1:** Employees who work “on or in connection with” a covered contract/subcontract
 - **Prong #2:** Employees who work at a “covered contractor workplace”
 - Extends to employees who are not themselves working “on or in connection with” a covered contract/subcontract

Which Employees Are Covered?

Prong #1: Working “on or in connection with”

- Working “on” a covered contract means directly performing the work (e.g., installers, inspectors)
- Working “in connection with” means indirectly supporting the work (e.g., billing, HR, legal review)
 - Is the indirect work “necessary to performance” of the contract?
 - Potential 20% threshold for determining whether an employee is covered
- C-suite level executives may not be covered; fact dependent analysis

Which Employees Are Covered?

Prong #2: Covered Contractor Workplaces

- A “covered contractor workplace” is a location that:
 - (1) is controlled by a covered contractor; **AND**
 - (2) a covered employee who works “on or in connection with” a covered contract is **likely** to be present at the location during the period of performance
 - Does the “covered” employee come in for trainings or meetings?
 - EX: Construction foreman is a covered employee who only comes into corporate office for quarterly training seminar. No other employees at that office work “on or in connection with” a covered contract. Because covered foreman is likely to be present at corporate office, all employees at that office likely must be vaccinated.
- A permanently remote employee’s home is not a covered workplace
 - But, remote employees will be required to vaccinate if they work “on or in connection with” a covered contract

Are Any Individuals Excepted?

Task Force Guidance Exceptions

- Task Force Guidance provides an exception for employees at a covered workplace **if**:
 - Employee is not working “on or in connection with” a covered contract;
AND
 - Contractor can “affirmatively determine” that covered employees will not come into contact with non-covered employees, including in common areas
 - Lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages
- Visitors are not required to be vaccinated
 - Must abide by masking/physical distancing requirements
 - Contractor must post signage at entrances with info on safety protocols

Medical and Religious Exemptions

Contractor's Responsibility to Make Determination

- Task Force provides that contractor may grant an accommodation to an employee for the vaccination or mask requirements for:
 - a disability (including medical conditions); or
 - “a sincerely held religious belief, practice, or observance”
- Contractor should review and consider what, if any, accommodation it must offer and decide such requests, regardless of the covered contractor employee's place of performance
- Best practices would be to document any such requests and the basis for each disposition, which may prove useful for demonstrating compliance to the Government, if necessary

Other Requirements Under the Guidance

Masking and Physical-Distancing Requirements

Workplace Rules

- Low/moderate community transmission, vaccinated employees and vaccinated visitors do not need to wear masks indoors
- High transmission, all employees and visitors must wear a mask indoors—even if vaccinated
 - CDC COVID-19 Data Tracker County View website posts transmission rates
- Unvaccinated visitors and exempted employees must physically distance and wear masks indoors and in certain outdoor settings (e.g., worksite), except when:
 - In a closed office, with floor-to-ceiling walls
 - Eating or drinking
 - In an environment where mask may get wet
 - Performing strenuous activities that make it difficult to breathe with a mask

Obligations for Subcontractors' Compliance

Current Framework

- Task Force Guidance indicates that contractor's responsibility is **limited** to flowing-down the contract clause to their first-tier subcontractors, subject to exception
 - In turn, those subcontractors are responsible for flowing-down the clause to the next-tier subcontractors, subject to exception, and so on
- No requirement to monitor compliance

Designating a Compliance Coordinator

Requirements

- Covered contractors/subcontractors must designate a person(s) to coordinate implementation with Task Force safety protocols
 - Coordinator can manage multiple locations—no requirement to be based in office
- Coordinator is responsible for:
 - Providing info on safety protocols to employees
 - Posting signage at contractor facility with requirements explained for all employees, visitors, etc.
 - Ensure compliance with safety protocols, including showing proof of vaccination documentation
 - Proof must only be shown once for review (*i.e.*, no need to continually show vaccine card)
 - Employers do not need to store copies of proof

Employer Policies & EEO Issues

Employer Policies and EEO Issues

Current State of Play re Employer Vaccine Mandates

- Employers generally allowed to mandate vaccination, subject to
 - (1) religious accommodations under Title VII of the Civil Rights Act;
AND
 - (2) medical accommodations under the Americans with Disabilities Act (“ADA”)
- Differences in employer obligations under each protected category
 - Permissible employer inquiries
 - Differing standards for “undue burden”
 - “Direct threat” analysis under the ADA
- State law issues (e.g., Montana, Texas)

What is AGC of America Doing to Advocate for the Construction Industry?



- Significant outreach OMB, Safer Federal Workforce Task Force, FAR Council, Department of Defense, many relevant federal entities, and others.
- Within days of announcement AGC [advocated](#) for the FAR Council and Task Force to consider the uniqueness of the construction industry.
 - AGC has [advocated](#) OSHA in its drafting of the ETS
- Engaged outside counsel to evaluate our legal options to challenge this requirement and have received a legal memorandum
- AGC and its members have encouraged voluntary COVID-19 vaccination for their employees since the vaccines became available. The construction industry has proven throughout the pandemic that it can work in a safe and essential manner.

Resources

Helpful Links

- [E.O. 14042: Ensuring Adequate COVID Safety Protocols for Federal Contractors](#)
- [Safer Federal Workforce Task Force's September 24, 2021 Guidance](#)
- [Safer Federal Workforce Task Force Vaccination FAQs](#)
- [GSA, MCC, NASA, DHS, and DOJ Class Deviations](#)
- [DoD Class Deviation](#)
- [DOE Class Deviation](#)
- [C&M Alert with Agency-Class-Deviation Guidance, A-Side-by-Side-Comparison](#)

Questions?



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