

# Vaccinations Required for Covered Federal Contractor Employees by December 8

Alert

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On September 24, 2021, the Safer Federal Workforce Task Force issued its hotly anticipated [workplace safety guidelines](#) as required by Executive Order 14042, [Ensuring Adequate COVID Safety Protocols for Federal Contractors](#). The guidance, which is sure to spur as many questions as it answers, at a high level does the following:

- Defines the broad category of government contracts and contract-like instruments covered by the executive order, as well as the extensive group of employees covered
- Requires covered contractor employees to be fully vaccinated by December 8, 2021, except in limited circumstances where an employee is legally entitled to an accommodation
- Includes requirements for masking and social distancing
- Requires contractors to designate a person to coordinate implementation and compliance with the guidance

## WHAT CONTRACTS AND EMPLOYEES ARE COVERED?

**Covered Contracts:** The executive order directed executive departments, agencies and independent establishments to ensure that covered contracts and contract-like instruments include a clause that the contractor and any subcontractors shall incorporate into all lower-tier subcontracts that requires contractor employees to be fully vaccinated against COVID-19. The guidance makes clear that the executive order applies to a broad category of contracts, and flows down to all tiers of subcontracts.

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Instead of specifying details about covered contracts, the guidance incorporates and adopts definitions under the Department of Labor's proposed rule, "[Increasing the Minimum Wage for Federal Contractors](#)," 86 Fed. Reg. 38,816, 38.887 (July 22, 2021). Under this proposed rule, a contract will include "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law," including "a mutually binding legal relationship obligating one party to furnish services (including construction) and another to pay for them." Identified types of arrangements that would be considered contracts or contract-like instruments include: procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing.

The guidance confirms that the rule is intended to apply to contracts and contract-like instruments covered by the Service Contract Act, Davis-Bacon Act, concessions contracts not subject to the Service Contract Act, and contracts in connection with federal property or land and related to offering services for federal employees, their dependents or the general public.

The guidance expressly states that contracts below the simplified acquisition threshold (SAT), as well as prime and sub contracts for manufacturing of products, are not specifically covered or addressed by the executive order or guidance. The SAT threshold currently is \$250,000, however, specific types of contracts may have different triggering thresholds. The guidance is silent on grants and specified Indian agreements that were excluded in the executive order. In addition, despite the broad definition, other transactions also are not addressed.

Given the risk that the guidance could be broader than the executive order in its coverage, the lack of clarity on what is exempt in the guidance is likely to give rise to further questions and litigation down the road. Moreover, the guidance strongly encourages agencies to include the clause implementing the executive order and guidance in new procurements, new contracts and contract modifications below the SAT or for manufacturing of products. It is possible that an agency will insist on inclusion of the clause in contracts that were not intended to be covered by the requirements under the executive order. This could lead to confusion, inconsistent application, and the opportunity for contractors and subcontractors to push back on attempts to include the clause in their agreements.

**Covered Contractor Employees:** Once a contractor determines that it has a covered contract, the next question is which of the contractor's workers are covered by the executive order. "Covered contractor employee" includes 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. This includes employees who perform duties necessary to the performance of the covered contract, and further includes employees who do not directly engage in performing the specific work covered by the contract, but who perform

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services in connection with the contract such as human resources, billing and legal review. Even employees of covered contractors who are not themselves working on or in connection with a covered contract, but who are working at the covered workplace location where they are at risk of interacting with covered employees in stairwells, elevators, cafeterias and the like are covered.

**Covered Workplace Locations:** The definition of a covered “contractor or subcontractor workplace location” is a location where the covered contractor employees work. A contractor or subcontractor workplace location does not include a “covered contractor employee’s residence.” However, employees working on a covered contract from their homes are still considered a covered contractor employee and must comply with the vaccination requirements, even if the employee never works at the covered contractor workplace or federal workplace. The employee working remotely at their residence, however, does not need to comply with masking or physical distancing requirements in that residence.

## WHAT ARE THE VACCINATION REQUIREMENTS?

The guidance requires covered contractor employees to be fully vaccinated by December 8, 2021, except in circumstances where an employee is legally entitled to a religious or disability accommodation. After that date, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded contract or an exercised option, extension or renewal of an existing contract, when the clause is incorporated into the covered contract. Employees are considered fully vaccinated two weeks after they receive their second dose in a two-dose series or after they receive a single-dose vaccine. Note that this definition may change if CDC guidance is revised. This is an important qualification as the CDC is currently considering whether and when to require vaccination boosters.

Contractors must review their covered employees’ documentation to prove vaccination status. The guidance does not require that covered contractors retain copies of the documentation; employees must “show or provide” documentation. Sufficient documentation includes one of the following: (1) copy of immunization record from health care provider or pharmacy; (2) CDC card; (3) copy of medical records documenting the vaccination; (4) copy of immunization records from public health or state immunization system; or (5) “any other official documentation verifying vaccination with information on the vaccine name, date(s) or administration, and the name of the health care professional or clinic site administering the vaccine.” Contractors who choose to obtain copies of vaccination documentation should ensure that this information is maintained confidentially.

## WHAT ARE THE RULES FOR MASKING AND SOCIAL DISTANCING?

Covered contractors must ensure that all individuals, including covered contractor employees and visitors, comply with published CDC guidance for masking and physical distancing at a covered contractor workplace. Covered contractors must check the [CDC COVID-19 Data Tracker](#) website for community

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transmission information in all areas where they have a covered contractor workplace at least weekly to determine proper workplace safety protocols.

Under the current CDC guidance, everyone regardless of vaccination status must wear a mask in indoor settings. In low or moderate community transmission, fully vaccinated individuals do not need to wear a mask. In all settings, fully vaccinated individuals do not need to practice social distancing.

Individuals who are not fully vaccinated must wear a mask in indoor and outdoor settings regardless of the level of community transmission in the area. To the extent possible, such individuals should also practice social distancing at all times.

The guidance also provides that the individual agency may insert additional or increased requirements in this regard notwithstanding current published CDC guidance. Contractors at all tiers therefore need to be cognizant of the specific requirements of their contracting agencies.

## WHO IS RESPONSIBLE FOR ENSURING COMPLIANCE?

Covered contractors are required to designate a person or persons to coordinate implementation of and compliance with the guidance. This designee(s) must ensure information on the COVID-19 workplace safety protocols are provided to employees, including communicating such information by email, website, memoranda, flyers, signage, etc. The executive order and guidance are silent on how the government plans to enforce compliance with these requirements. However, the standard contract enforcement options, such as FAR Mandatory Disclosure, contract audits, investigations, claims, termination, as well as referrals for debarment or suspension, remain potential weapons in the government's enforcement arsenal.

## WHAT HAPPENS NEXT?

Covered contractors should take steps now to prepare for the implementation of the executive order and guidance in their workplaces and application to its employees. While the acting director of the OMB issued a pre-publication copy of the planned notice of determination to issue on September 27, stating simply that the guidance will improve economy and efficiency (paving the way for issuance of formal rulemaking to implement the guidance in clauses for FAR and non-FAR contracts and similar agreements), many contractors will certainly disagree given the time and cost that will go into implementing the guidance. We anticipate challenges to the executive order and pushback from contractors who are asked to incorporate the clause—indeed, some state governments have purported to disallow the type of actions taken in the guidance (which state measures the guidance specifically notes are invalid).

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## WHAT SHOULD CONTRACTORS DO TO PREPARE?

Absent successful legal challenges to the executive order, we can expect continued activity and inclusion of clauses requiring compliance with the guidance. Therefore, the following are recommended actions contractors should take now:

- Review your existing and anticipated new government contracts to evaluate if they will be deemed a covered contract and evaluate the likely timing of a new or modified contract that will trigger coverage.
- If you have outstanding proposals, check to see if the clause will be incorporated as requirements are not expected to roll out until October 8, 2021, which is the deadline for the FAR Council to develop a clause to be included in contracts entered into on or after October 15, 2021. Contracts issued before then may not include these provisions, but covered contracting opportunities issued after that date likely will.
- Consider the impact of any cost, timing, and method of performance that the guidance will have in the preparation of any proposals for new contracts or bilateral modifications to existing contracts.
- If you are not already, begin tracking the vaccination status of likely covered employees and start a communication campaign to explain the requirements.
- Consider implementing masking requirements if not already in place and ensure a strategy is in place for social distancing.
- Designate and train the person(s) who will be responsible to coordinate implementation of and compliance with the guidance.

We have been advising employers on COVID-19-related issues throughout the pandemic. If your business needs help developing new vaccine policies and practices, including accommodation processes, determining coverage of the guidance to your contracts, or evaluating strategies to negotiate modifications to existing contracts, we can help.

For more information on Executive Order 14042 and the guidance, please contact [Brittany Barrientos](#), [Amy Conway](#), [Susan Warshaw Ebner](#), [Alisa Ehrlich](#), [Kelly Maxwell](#), [Stephanie Scheck](#), [Eric Whytsell](#) or the Stinson LLP contact with whom you regularly work.

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