

What Federal Contractors Should Know About The New COVID-19 Vaccine Requirements

Background

AGC members that perform work on any federal contracts should review the guidelines and updates from the [Safer Federal Workplace Task Force](#) (Task Force) closely and frequently due to the quickly evolving requirements. This memo is broad summary of the Task Force requirements and does not address other requirements, such as OSHA's Emergency Temporary Standard on COVID-19 Vaccination.

On September 9, 2021, President Biden issued Executive Order 14042, [Ensuring Adequate COVID Safety Protocols for Federal Contractors](#). This E.O. directs executive federal agencies to ensure that contracts and contract-like instruments *covered* by the order include a contract clause requiring the contractor and all tier subcontractors to, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Task Force. These workplace safety protocols, including COVID-19 vaccine mandates, will apply to all *covered* contractor employees, including employees in *covered* contractor workplaces who are not working on a direct federal contract or contract-like instrument.

On September 24, the Task Force issued [Guidance for Federal Contractors and Subcontractors](#) (updated November 10, 2021) implementing a broad vaccination mandate for direct federal contractors. The Task Force's guidance raises many questions without clear answers, including but not limited to how the mandate will be enforced, employer liabilities stemming from the mandate, how collective bargaining agreements will be affected, whether a federal agency will be responsible for enforcement, etc. On September 30, the Task Force published its [Frequently Asked Questions for Federal Contractors](#).

On September 30, the Task Force released the "[Contract Clause](#)" (FAR Clause 52.223-99) and directed federal agencies to incorporate the contract clause in the manner prescribed by the Task Force. The Contract Clause requires prime contractors and subcontractors to comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of the contract, for contractor or subcontractor workplace locations published by the Task Force. In essence the Contract Clause requires prime contractors and subcontractors to comply with the vaccine mandate and any directions from the Task Force for the duration of the federal contract.

Important Dates

- **November 14** – For new federal contracts (including new task orders issued under existing IDIQ or MATOC contracts) the clause must be incorporated into awards made on or after November 14, 2021.
- **January 18** – For contracts that include the clause, applicable federal contractor employees on covered contracts must be fully vaccinated no later than January 18, 2022.
 - Note: For existing contracts without the clause (*e.g.* contracts awarded prior to November 14) these requirements likely do not apply unless the federal contracting agency affirmatively includes it. However, other masking, social distancing and testing will apply.
 - Note: The original compliance date of December 8, 2021 was moved to January 18, 2022 in order to align with the OSHA Emergency Temporary Standard.

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Covered Contracts

- Direct Federal Contractors – The vaccine mandate applies to direct federal contractors. Task Force uses the Department of Labor’s definition in the [proposed rule](#) in its proposed federal contractor minimum wage. Therefore, if a contractor has had to comply with this minimum wage rule or previously issued paid leave requirements or the contract clause a project is covered by the federal contractor minimum wage and paid leave requirements, this mandate will also apply.
- Not Federal-Aid (e.g. Highway) Contractors, unless also performing federal work – The vaccine mandate does not apply to federal-aid contracts, but may still apply to employees if the employer has a direct federal contract that is covered as described below. Businesses that do not directly contract with the federal government are not affected by the vaccine mandate. For example, if your company does heavy civil construction and does not have any contracts with a federal construction agency (e.g., U.S. Army Corps of Engineers (USACE)), this mandate would not apply. However, if your company does heavy civil construction and performs a majority of its work, for example, for state departments of transportation, but also performs some work (even on only one contract) for a federal construction agency like USACE, then this mandate would apply (the extent to which depends on a host of factors).
- Not Contractors Outside United States of America – The requirements do not apply to solicitations and contracts where the performance is outside the United States or its outlying areas. However, the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas.

Covered Contractor Employee

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 of covered contractors who are not themselves working on or in connection with a covered contract.

- Note: The Task Force has told AGC that the second sentence in the definition above was intentionally included in order to expand to the number of employees that will fall under the vaccination mandate.

Covered Contractor Workplace

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. A covered contractor workplace does not include a covered contractor employee’s residence.

- Note: An individual working on a covered contract from their residence is a covered contractor employee and must comply with the vaccination requirement.

Fully vaccinated

People are considered fully vaccinated for COVID-19 two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single-dose vaccine. There is currently no post-vaccination time limit on fully vaccinated status; should such a limit be determined by the Centers for Disease Control and Prevention, that limit will be considered by the Task Force and Office of Management and Budget for possible inclusion.

- Note: It is important to note that the Task Force keeps in place the exemptions for sincerely held religious and pre-existing medicinal conditions.

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No Option for Testing

Unlike the [requirements](#) issued on July 29 or the OSHA ETS, the contract clause provides no option for attesting to vaccination, proof of a recent antibody test, or submission to any testing in lieu of vaccination. However, the Task Force does not explicitly state whether or not the previous requirements issued in July are revoked by the contract clause.

“In Connection With”

The Task Force takes an expansive definition and attempts to apply the term, and therefore the vaccination requirements, as broadly as possible. The Task Force extends “in connection with” to any employee who perform duties necessary to the performance of the covered contract, but who are not directly engaged in performing the specific work called for by the covered contract, such as human resources, billing, and legal review, perform work in connection with a Federal Government contract.

Transform a Workplace

According to AGC’s conversations with the Task Force a covered contractor employee who works on or in connection with a covered contract can easily “transform” an otherwise non-covered contractor workplace into a covered contractor by workplace merely by traveling for any length of time to the non-covered contractor workplace. While the Task Force provides instances where employees can be separate and not transform the workplace, these include impractical options such as ensuring covered and non-covered workers do not use the same stairwell, kitchen, restrooms, etc.

Flow Down to All Lower-Tier Subcontractors

A prime contractor must flow the clause down to first-tier subcontractors; higher-tier subcontractors must flow the clause down to the next lower-tier subcontractor, to the point at which subcontract requirements are solely for products. Apart from inclusion of the clause in the contract, a contractor is not required to verify its subcontractor’s compliance.

Unvaccinated Contractors

Covered contractor must ensure the covered contractor employee at a covered contractor workplace is following all workplace safety protocols for individuals who are not fully vaccinated. Ultimately, it is the federal agency that will determine the workplace safety protocols that individuals who are not fully vaccinated must follow while in a Federal workplace. In most circumstances individuals who are not fully vaccinated need to follow applicable masking, physical distancing, and testing protocols. There may be circumstances in which an agency determines that the nature of a covered contractor employee’s job responsibilities requires heightened protocols. Covered contractors should notify their contracting officers when one of their employees who works onsite at a Federal workplace has received an exception to the requirement to be fully vaccinated.

Reporting and Enforcement

Employees are required to submit to employers a COVID-19 Vaccination Record Card or similar copies of record of immunization. Employees will not be able to attest to employers in lieu of vaccination. The Task Force does not require contractors to affirmative report these records to any federal entity. Each contractor must designate a person or persons to coordinate implementation and compliance with the guidance and safety protocols.

Post Signage

The Task Force requires covered contractors to post signage at entrances to covered workplaces providing information on safety protocols. Sample signage for areas of high or substantial levels of community transmission can be found [here](#). Sample signage for areas of low or moderate levels of community transmission can be found [here](#).

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Accommodations

Legal accommodations—such as sincerely held religious and pre-existing medicinal conditions—are permitted. Employers are responsible party for considering and determining employee’s request for accommodations and does not provide much guidance to employers making these determinations. The Task Force does state that it follows the CDC in determining medical conditions to be [contraindications](#) to the vaccines.

Small Businesses

The Task Force’s contract clause requiring federal contractor vaccination applies regardless of the size of the federal contractor or subcontractor. While the OSHA ETS applies to companies of 100 or more employees, there is no size standard for the federal contractor vaccine mandate.

Assume Subcontractor Compliance

In general, there is no responsibility for a prime contractor to ensure that subcontractor is compliant with the contract clause, “unless the prime contractor has credible evidence otherwise.” The prime contractor is responsible only for ensuring that the required contract clause is incorporated into its first-tier subcontract.

Vaccinated Employees and Masks

Masks requirements for fully vaccinated employees depends on whether they are in high or substantial transmission areas and areas of low or moderate transmission. Fully vaccinated employees in areas of substantial or high transmission (see the [CDC COVID-19 Data Tracker County View](#)) need to wear a mask in public indoor settings. Fully vaccinated employees in areas of low or moderate transmission do not need to wear a mask, unless required by state or local regulations or laws.

OSHA ETS and Local Prohibitions

The Task Force and OSHA clearly state that the contractors subject to the contract clause requirements are unaffected by the OSHA ETS. Meaning that covered federal contractors do not have the testing option that the OSHA ETS provides. The Task Force asserts the contract clause for federal contractors supersedes any contrary State, local law, or ordinance.

Conclusion

The vaccine requirements are quickly being promulgated and it is important that AGC members that preform work on any federal contracts should review the guidelines and updates from the Task Force closely and frequently due to the quickly evolving requirements. Contractors should work with their and legal counsel and human resources department to develop protocols to comply with the vaccine mandates. Contractors should communicate with their contracting officer to determine which contracts will be affected.

As AGC members prepare for the uncertainty ahead AGC of America has gathered resources to assist its members facing COVID-19 vaccine requirements; vaccine safety and their effectiveness that members can use in their educational efforts; and provided resources to assist with employer vaccine policies. These resources include [AGC COVID-19 Vaccine Toolkit](#). There are a lot of questions that have yet to be answered. AGC of America is reaching out to the FAR Council, Task Force, and other federal agencies, and will update AGC members as we learn more.

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