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Federal Contractor Specific COVID-19 Workplace Safety Guidance Issued By The Safer Federal Workforce Task Force

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President Biden's September 9, 2021 Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, directs the federal Safer Federal Workforce Task Force ("Task Force") to develop COVID-19 workplace safety guidance for federal contractors and subcontractors providing services to or for the federal government. The Executive Order requires the guidance to apply broadly, not only to contracts governed by the Federal Acquisition Regulations ("FAR"), but also to "contracts and contract-like" instruments not covered by the FAR. The Executive Order also directs the Federal Acquisition Regulatory Council to develop new contract clauses that will incorporate the Task Force's guidance into new and newly-amended federal contracts.

Guidance coverage

While the Government has not yet released the specific contract language, the Task Force recently issued its Guidance for Federal Contractors and Subcontractors ("Guidance"). Federal contractors and subcontractors providing services to the federal government should begin preparing now to implement the new Guidance. The Task Force's COVID-19 Guidance provisions apply as follows:

Does not apply to contracts or subcontracts for products.

Applies only to "covered contracts" for services (including construction) to be performed in the United States. Specifically, the Guidance applies to contracts covered by the Service Contract Act, the Davis Bacon Act, concessions

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contracts not otherwise covered by 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."

Applies to "covered contractor employees" defined as full-time or part-time employees "working on or in connection with a covered contract or working at a covered contractor workplace." This definition can be unexpectedly expansive because it extends not only to employees working directly on the federal contract but also to support or overhead staff that support the contractor's overall business such as human resources, billing/accounting, and legal, among other functions.

Applies to "covered contractor workplaces" defined as a location controlled by a contractor or subcontractor where a "covered contractor employee" is likely to be present during the period of performance for a covered contract. This definition expressly excludes the residences of covered employees. Employees working exclusively from their homes are thus exempt from the mask and physical distancing requirements, but not the vaccination requirement.

Applies to all contractors with a "covered contract" and all tiers of subcontractors providing services and working on a "covered contract." There is no exemption for small businesses.

Guidance requirements

The new Guidance has three main components: (1) vaccination of covered contractor employees; (2) masking and physical distancing at covered contractor workplaces; and (3) designation by contractors and subcontractors of a person or persons to coordinate workplace COVID safety.

Vaccination of covered contractor employees

The Guidance requires covered contractors and subcontractors to ensure that all "covered contractor employees" are fully vaccinated no later than December 8, 2021 (or the first day of performance on a newly-awarded covered contract, newly-exercised option, or newly-extended or renewed contract), unless individual employees are entitled to an accommodation.

The only exception to the vaccine requirement is for employees who are seeking an accommodation for a disability (including medical conditions) or a "sincerely held religious belief, practice, or observance." The Guidance permits each contractor to determine "what, if any, accommodation it must offer" to employees asserting disability/medical or religious grounds for an exemption from the vaccination requirement. Contractor employees working remotely from their residences are not exempt from the vaccination requirement.

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To ensure that its covered workforce is vaccinated, the Guidance mandates that contractors require their employees (including employees who had a prior COVID-19 infection) to show hard copy or digital documentation of vaccination, in the form of one of the following:

Record of immunization from a health care provider or pharmacy;

COVID-19 Vaccination Record Card (CDC Form MLS-319813_r);

Medical records documenting vaccination;

Immunization records from a public health or State immunization system; or

"[A]ny other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering the vaccine."

Covered contractors and subcontractors may not accept a recent antibody test to prove vaccination status.

Masking and physical distancing while in covered contractor workplaces

In addition to ensuring their workforce is vaccinated, the Guidance also requires covered contractors and subcontractors to ensure that all covered contractor employees and visitors at a covered contractor workplace comply with CDC guidance for masking and physical distancing.

Covered contractors and subcontractors are required to check the CDC's COVID-19 Data Tracker County View website on at least a weekly basis to determine the level of community transmission in the county in which their covered workplaces are located and adapt their workplace COVID-19 precautions accordingly.

In areas of low or moderate community transmission, fully vaccinated people do not need to wear a mask.

In areas of high or substantial community transmission, fully vaccinated people must wear a mask in indoor setting (subject to exceptions).

Persons not fully vaccinated must wear a mask indoors and in certain outdoor settings (e.g., crowded outdoor gatherings or work that involves sustained close contact with people who are not fully vaccinated) at all times regardless of the level of community transmission.

Contractors may not switch to low or moderate community transmission protocols until the lower level of community transmission remains at a lower level for at least two consecutive weeks.

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According to the CDC's website, nearly every county in the United States is currently at the "high" or "substantial" community transmission level. This means that currently nearly all covered employees working at a covered workplace will be required to wear a mask indoors.

Covered contractors and subcontractors may provide exceptions for mask and physical distancing requirements for vaccinated covered employees only when:

An individual is alone in an office with floor to ceiling walls and a closed door;

Eating or drink, provided physical distancing is maintained;

Engaging in activities in which a mask may get wet;

Engaging in "high intensity activities" where there may be difficulty breathing with a mask; or

Engaging in activities where wearing a mask would create a risk to workplace health, safety, or job duty as determined by an OSHA governed workplace risk assessment.

Any exception to masking and physical distancing must be approved in writing by a duly-authorized representative of the covered contractor or subcontractor.

Covered contractors and subcontractors may provide accommodation to covered employees who communicate that they cannot wear a mask due to a disability (including medical conditions) or because of a sincerely held religious belief, practice, or observance.

The Guidance applies to both indoor and outdoor workplace locations.

Covered contractors and subcontractors are required to enforce appropriate mask and physical distancing protocols for all visitors to covered contractor workplaces. This means that contractors should post signage at entrances to workplaces advising the proper mask and physical distancing requirements for vaccinated and unvaccinated visitors. Contractors are also authorized to require "all visitors to follow masking and physical distancing protocols for not fully vaccinated individuals."

Designation of person(s) to coordinate COVID-19 workplace safety

The Guidance provides for each covered contractor and subcontractor to "designate a person or persons to coordinate implementation of and compliance with this Guidance . . . at covered contractor workplaces." The designated person(s) will be responsible for informing covered employees of applicable COVID-19 workplace safety protocols required by the Guidance "in a readily understandable manner." Memoranda, flyers, posters, email, websites, and other electronic or hard copy means are specifically mentioned as methods of communicating applicable safety protocols.

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The "designated person" is also responsible for (1) ensuring that covered employees provide timely and complete hard copy or digital documentation of vaccination; and (2) communicating masking and physical distancing requirements "to visitors and all other individuals present at covered contractor workplaces."

Federal preemption

The Guidance expressly states that it is "promulgated pursuant to Federal law and supersede[s] any contrary State or local law or ordinance." Hence, the Guidance supersedes and preempts any state or local law or regulation attempting to prohibit compliance with any aspect of the Guidance. There is nevertheless nothing in the Guidance that would prohibit contractors or subcontractors from complying with state or local laws "establishing more protective workplace safety protocols than those established under" the Guidance.

The Guidance is expressly "in addition" to any workplace safety requirements from the Occupational Safety and Health Administration (such as the forthcoming rules for employers with more than 100 employees). This means that contractors and subcontractors must comply with the Guidance as well as any other federally-enacted workplace safety requirements.

Federal contracting issues

Contractors and subcontractors must comply with both the Guidance and any additional agency workplace safety requirements imposed by each customer federal agency for whom the contractor is performing services. The Guidance does not replace or preempt individual federal customer requirements.

The FAR Council has not yet published new contract clauses implementing the Guidance. These are expected by October 8, 2021. The Guidance nevertheless specifically states that prime contractors and subcontractors of all tiers will be required to flow down the new contract clauses to each of their respective covered subcontractors.

Until we see the specific text of the contract clauses implementing Executive Order 14042 and expressly incorporating the Task Force's COVID-19 Guidance, it is unclear what penalties contractors may face for their own non-compliance with the Guidance or any non-compliance by their subcontractors. It is reasonable to assume that "normal" contract remedies, such as contract termination, suspension, and debarment may be authorized. Assuming there is a sufficient factual basis for it, contractors or subcontractors who falsely certify compliance with the Guidance could also face civil or criminal liability under the False Claims Act.

The Guidance also states that covered contractors and subcontractors will be required to comply with any updates to the Guidance. It is expected that the upcoming contract clause will simply require

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contractors to comply with the Guidance and any subsequent amendments to the Guidance. Hence, even if the contract clause itself does not change, the underlying Task Force Guidance may change and contractors and subcontractors at all tiers will likely be required to comply with the updated Guidance requirements. This raises many of the same concerns that were present in the system developed by the Obama Administration in connection with the bifurcated structure of the now-repealed Fair Pay and Safe Workplace regulations. Therefore, contractors and subcontractors of all tiers should pay close attention for any amendments or updates to the Guidance and take steps to implement them.

Contractors and subcontractors are advised to keep track of expenses directly related to compliance with the Guidance in the event that the yet to be released contract clauses provide grounds for a contract price adjustment.

Conclusion

Both the Guidance and the future FAR clauses are rapidly evolving. Husch Blackwell will be publishing additional guidance and insights as future developments warrant.

Contact us

Michael Schrier, Brian Hendrix, Tom O'Day, Barbara Grandjean, Thomas Godar or your regular contact in the firm's Government Contracts or Labor & Employment practice groups are available to answer any questions you may have.

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