

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

Background

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 [Safer Federal Workplace Task Force](#) (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](#) 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](#).

AGC members that perform work on any federal contracts should review the guidelines and updates from the 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 pending Emergency Temporary Standard on COVID-19 Vaccination.

Important Dates

- **October 8** – Federal Acquisition Regulation (FAR) Council is required to complete an interim contract clause (the clause) that will be the basis for requiring vaccination requirements on covered contracts and continued compliance with the Task Force requirements for the duration of the contract.
- **October 15** – The clause must be included in federal solicitations issued beginning October 15, 2021.
 - For federal contracts awarded prior to October 15 where performance is ongoing the clause must be incorporated at the point at which an option is exercised or an extension is made.
- **October 15 to November 14** – Federal agencies are required to include the clause in federal solicitations and are encouraged, but not required, to include the clause in contracts awarded during this time.
- **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.
- **December 8** – For contracts that include the clause, applicable federal contractor employees on covered contracts must be fully vaccinated no later than December 8, 2021.
 - 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.

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

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requirements of 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.

No Option for Testing

Unlike the [requirements](#) issued on July 29, 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

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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.

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.

Conclusion

The vaccine requirements are quickly being promulgated and it is important that AGC members that perform 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 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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This Memo is provided as a general description of circumstances that federal construction contractors may face in connection with COVID-19 vaccination mandates. This material does not constitute legal advice. By providing this information AGC does not provide any assurances that it will be relevant to any particular contract or situation that an individual contractor may face in connection with an individual contract. This memo does not create an attorney-client relationship between the AGC and any person or company.