

FAR Council Issues Guidance to Federal Contractors and Subcontracts Related to Mandatory Vaccination of Certain Employees

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On September 30, 2021, the Federal Acquisition Regulation (“FAR”) Council issued a memorandum requiring that most federal contractors and subcontractors include a clause in future contracts and subcontracts that require employees to be vaccinated. This directive follows President Biden’s September 9 announcement, as well as the Safer Federal Workforce Task Force Guidance (the “Guidance”) issued on September 24.

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The Clause Must be Included in Most Federal Contracts and Subcontracts

As anticipated, the FAR Council’s memorandum requires that the following language be included in most federal contracts and subcontracts beginning as soon as October 15 (as discussed in detail below):

“ENSURING ADEQUATE COVID-19 SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS (OCT 2021) (DEVIATION)

(a) Definition. As used in this clause -

United States or its outlying areas means—

- (1) The fifty States;
- (2) The District of Columbia;
- (3) The commonwealths of Puerto Rico and the Northern Mariana Islands;
- (4) The territories of American Samoa, Guam, and the United States Virgin Islands; and
- (5) The minor outlying islands of Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(b) Authority. This clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985).

(c) Compliance. The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at <https://www.saferfederalworkforce.gov/contractors/>

(d) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.”

The Vaccine-Mandate Requirement Takes Effect as Soon as October 15, 2021

The timelines set by the FAR Council and the Task Force are tight. Some federal contractors and subcontractors will need to begin complying as soon as October 15, 2021. However, the timelines for compliance applicable to your company will depend on the exact nature of the contract(s) at issue:

1. If your company currently has federal contracts or subcontracts, the vaccine (less medical and religious exemptions), masking, and social distancing requirements must be included in any federal contracts and subcontracts when an option or extension is exercised, or if the federal agency voluntarily elects to incorporate the vaccination requirements into current contracts.
2. If your company is awarded new federal contracts or subcontracts on or after November 14, 2021, the contracts will have to include the vaccine (less medical and religious exemptions), masking, and social distancing requirements.
3. If your company responds to a solicitation for federal contracts or subcontracts sent by a federal agency on or after October 15, 2021, the contracts will have to include the vaccine (less medical and religious exemptions), masking, and social distancing requirements. If the solicitation comes out prior to October 15, 2021, then the vaccine (less medical and religious exemptions), masking, and social distancing requirements do not have to be in the new contract (unless the federal agency voluntarily elects to incorporate those requirements), but would have to be incorporated at the time an option is exercised or the contract is extended.

Importantly, the requirements are prospective, not retroactive. If your company has a federal contract or subcontract that does not contain an option or exercise date and that will end on a date certain, that contract does not need to include the clause set forth above unless the federal agency voluntarily requires it.

Some Remote Employees, and Some Employees in Workplace Locations with Covered Employees, May Need to be Vaccinated

Workers who perform services on covered contracts from their respective homes will be

required to be vaccinated under the FAR Council's memorandum. There are also considerations for workers who are not working on a federal contract or subcontract, but who are working in the same facility as other workers performing services on a federal contract or subcontract. Specifically, if there are employees of other entities working in the same facilities, but not working on a federal contract or subcontract, those employees likely will also have to comply with the vaccine mandates in the Executive Order.

On that issue, the Safer Workplace Taskforce has issued the following guidance:

Q8: If a covered contractor employee is likely to be present during the period of performance for a covered contract on only one floor or a separate area of a building, site, or facility controlled by a covered contractor, do other areas of the building, site, or facility controlled by a covered contractor constitute a covered contractor workplace?

A: Yes, unless a covered contractor can affirmatively determine that none of its employees on another floor or in separate areas of the building will come into contact with a covered contractor employee during the period of performance of a covered contract. This would include affirmatively determining that there will be no interactions between covered contractor employees and non-covered contractor employees in those locations during the period of performance on a covered contract, including interactions through use of common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.

Q9: If a covered contractor employee performs their duties in or at only one building, site, or facility on a campus controlled by a covered contractor with multiple buildings, sites, or facilities, are the other buildings, sites, or facility controlled by a covered contractor considered a covered contractor workplace?

A: Yes, unless a covered contractor can affirmatively determine that none of its employees in or at one building, site, or facility will come into contact with a covered contractor employee during the period of performance of a covered contract. This would include affirmatively determining that there will be no interactions between covered contractor employees and non-covered contractor employees in those locations during the period of performance on a covered contract, including interactions through use of common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.

Federal Agencies May Choose to Impose Broader Scope for Vaccine Requirement

President Biden's September 9 Executive Order exempted the following contracts and contractors from the vaccine requirements: (1) grants, (2) contracts, contract-like instruments, or agreements with Indian Tribes under Public Law 96-638, (3) contract or contract-like instruments with value equal to or less than the simplified acquisition threshold as defined by the Federal Acquisition Regulation, (4) employees who perform work outside of the United States, or (5) subcontracts solely for the provision of products.

Although several of these exemptions still apply, as noted above, the FAR Council has

strongly encouraged federal agencies to apply the guidance to contracts awarded prior to November 14 on solicitations issued before October 15, to contracts excluded because they are below the simplified acquisition threshold, and to subcontracts for the manufacturing of products. If your company has federal contracts or subcontracts that fall into any of these categories, you should begin thinking about how you would comply if directed to include the clause.