

# HRW CLIENT ALERT

September 29  
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## New Guidelines on COVID-19 Vaccination and Other Safety Requirements for Federal Contractors and Subcontractors

On September 24, 2021, the [Safer Federal Workforce Task Force](#) (the Task Force) released new [guidance on COVID-19 workplace safety protocols for Federal contractors and subcontractors](#) (the “Guidance”). Pursuant to the Guidance, Federal contractors and subcontractors with a covered contract will now be required to conform to the following workplace safety protocols:

1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
2. Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces; and
3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

The Guidance was issued pursuant Executive Order 14042, [Ensuring Adequate COVID Safety Protocols for Federal Contractors](#) (the “Order”), which was part of the President’s [Path Out of the Pandemic: COVID-19 Action Plan](#) (the “Plan”), announced on September 9.

The following is a summary of the Guidance in its current form. Note that the Task Force is empowered to update the Guidance over time based on public health considerations and changes to CDC Guidance.

This Client Alert only discusses the new requirements applicable to federal contractors and subcontractors. This Client Alert does not discuss the forthcoming Occupational Health and Safety Administration (OSHA) emergency temporary standard (ETS), also announced on September 9 as part of the Plan, requiring all private employers with 100 or more employees to mandate vaccination or weekly testing for their unvaccinated employees. We anticipate issuing a separate Client Alert on the OSHA ETS when it is released.

### **Covered Businesses**

The Order does not apply to contracts or subcontracts whose value is equal to or less than the “simplified acquisition threshold” (currently \$250,000), nor does it apply to grants, contracts with Indian Tribes, or subcontracts that are solely for the provision of products<sup>1</sup>. Otherwise, if an

<sup>1</sup> Contracts for concessions, such as the furnishing of food, lodging, souvenirs, newspapers and the like to the general public are considered covered contracts under the Order.

employer, small or large, has any contract, subcontract, or “contract-like instrument” with the federal government, the Order likely applies to them. Businesses should consult with counsel to confirm the applicability of the Order to their business.

## **Covered Employees**

The stated goal of the Order is to get more people vaccinated, and thus the Guidance is quite broad in scope. The Order applies to any full-time or part-time employee of a covered contractor who either: (a) is working on or “in connection with” a covered contract, or (b) works at a covered contractor workplace—even if such employee is not themselves working on or in connection with a covered contract. The term “in connection with” includes general services like human resources, legal, and billing. Even remote workers are covered, though the masking and physical distancing requirements will not apply in a person’s residence. Persons who work outside of the United States are not covered.

## **Covered Workplaces**

The workplace safety standards apply to just about any facility, building, location, or site controlled by the covered contractor where covered employees are likely to be present, including work sites that are outdoors. The Frequently Asked Questions (FAQ) section of the Guidance clarifies that if there is any chance that a covered worker might come into contact with another employee (for example, in the lobby, stairs or other common areas), then everyone in the workplace is subject to the masking and distancing standards in the Guidance.

## **Vaccination Requirements**

Covered contractors must ensure that all of their covered employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation. Covered contractor employees must be fully vaccinated no later than December 8, 2021. After that date, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract. Agency heads are able to grant limited exceptions based on “urgent, mission-critical” needs.

The Guidance further states that covered contractors are “strongly encouraged” to incorporate similar vaccination requirements into their contracts with non-covered entities whose workers may be on site at their workplace, such as contracts related to the provision of food services, security, or groundskeeping.

Employers cannot just accept an employee’s word that they have been vaccinated; the employer must require the worker to show or provide the employer with one of the following documents: a copy of the record of immunization from a healthcare provider or pharmacy, a copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813\_r), a copy of medical records documenting the vaccination, a copy of immunization records from a public health or State immunization system, or a copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of the health care professional or clinic site administering the vaccine. The fact that an employee has had a prior infection or has had a recent antibody test is not sufficient—they must show proof that they have actually had the vaccine. Employers may accept a scan, photo, PDF, or digital copy of such record. The Guidance makes it clear that it is up to the employee to provide the required documentation. If the employee has lost their card, they are responsible for getting new documentation, and the Guidance includes information on how to do so.

Employers should remember that documents proving vaccination status are deemed medical records under the Americans with Disabilities Act (ADA). Employers need to store such records in a confidential location, separate from the employee's personnel file.

### **Reasonable Accommodations Based on Religion and Disability**

Covered contractors are still required to provide reasonable accommodations to employees who are unable to get vaccinated due to a disability or sincerely held religious belief, practice, or observance. The Guidance essentially punts on the question of how an employer should vet such requests, or what types of reasonable accommodations could be granted consistent with the safety goals of the Order. Employers will need to develop their own system for handling and documenting employee requests for reasonable accommodation, consistent with [Equal Employment Opportunity Commission \(EEOC\) guidelines](#).

### **Masking and Distancing Requirements**

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. Note that the CDC has published general guidelines applicable to all businesses, as well as special guidance applicable to healthcare, transportation, correctional and detention facilities, and schools. Contractors must comply with all guidance applicable to their business, as well as any more stringent state or municipal requirements.

The Guidance mandates that, in areas of high or substantial community transmission, even fully vaccinated people must wear a mask in indoor settings. In areas of low or moderate community transmission, fully vaccinated people do not need to wear a mask. Fully vaccinated persons are not required to physically distance.

Individuals who are not fully vaccinated must wear a mask indoors, regardless of the level of community transmission in the area. They must also maintain a distance of at least six feet from others at all times. Individuals who are not fully vaccinated must also wear a mask in crowded outdoor settings or during outdoor activities that involve sustained close contact with other people who are not fully vaccinated.

Covered contractors must check the [CDC COVID-19 Data Tracker County View website](#) for community transmission information in all areas where they have a covered contractor workplace at least weekly to determine proper workplace safety protocols. If the level of community transmission increases, the contractor or subcontractor must adhere to the increased standards. If the level of community transmission decreases, it must remain at that lower level for at least two consecutive weeks before the covered contractor can lower its standards.

Covered contractors need to require individuals to wear masks consistently and correctly. The term "mask" is defined in the Guidance to promote safety, and does not include masks with exhalation valves, vents or other openings, face shields without a mask, or masks with a single layer or thin fabric that does not block light.

The Guidance provides for certain exceptions to the masking requirements, including when an individual is alone, or for a limited time when eating or drinking with appropriate distancing. The Guidance permits employers to grant exceptions in other limited circumstances, such as where a mask might get wet, for high intensity activities requiring deep breathing, or other instances where the mask might create a health or safety risk; however, such exceptions must be approved in writing by a duly authorized person. Employees can also be asked to lower their mask briefly for identification and security purposes. The Guidance also notes that, as with vaccinations, reasonable accommodations may have to be granted to persons who are unable to wear a mask

due to religion or disability.

The FAQ states that covered contractors should post signage at their workplaces providing information on safety protocols for fully vaccinated and unvaccinated persons and instruct visitors to follow them while on site. Covered contractors may take other reasonable steps, such as requiring all visitors to follow masking and physical distancing protocols.

### **COVID-19 Coordinator Designation**

Covered contractors must designate a person or persons to coordinate implementation of and compliance with these workplace safety protocols at covered contractor workplaces (a “COVID-19 Coordinator”). Their responsibilities as COVID-19 Coordinator may comprise some or all of their regular duties.

Being a COVID-19 Coordinator is a serious job, as the Guidance speaks to their responsibility to “ensure” compliance with the vaccination requirements, including the requirement that employees show or provide proper documentary proof that they have been fully vaccinated. The designated individual(s) must also “ensure” that information on the required COVID-19 safety protocols is provided to covered employees and all other individuals likely to be present at a covered contractor’s worksite, such as visitors and vendors. The Guidance specifically mentions communication by email, websites, memoranda, flyers, or other means and posting signage at the workplace. The requirements must be set forth in a “readily understandable” manner.

One can infer from the Guidance that employers will need to select their COVID-19 Coordinators carefully. Such persons will need to understand and properly comply with the employer’s legal obligations with respect to medical privacy and non-discrimination. Such persons will also need to know how to properly address requests for reasonable accommodation based on religion or disability, including engaging in and documenting the legally-required interactive dialogue. Such persons will have to keep up with updates to Task Force and CDC guidance. They will have to enforce the rules, and to make challenging decisions.

### **Interplay with State and Municipal Requirements**

Covered contractors must comply with the Guidance, even if they are in a state with contrary laws, such as a state that currently prohibits vaccine mandates. The Guidance does not excuse employers from complying with any state laws or municipal ordinances establishing more protective safety protocols, nor does it relieve employers of other safety standards to which they may be subject.

### **Contract Implementation Issues**

The Order directs executive departments and agencies to ensure that covered contracts and contract-like instruments include a clause (the “clause”) that the covered contractor and any subcontractors—at every tier—shall, for the duration of the contract, comply with all guidance issued by the Task Force. The prime contractor is responsible for ensuring that the clause is included in its first-tier subcontracts. When the clause is incorporated into a subcontract, the subcontractor is required to comply with the Guidance, and also to “flow the clause down” to any lower-tier subcontractors in similar fashion.

The Guidance sets forth the following implementation schedule:

- For contracts awarded prior to October 15 where performance is ongoing, the requirements must be incorporated at the point at which an option is exercised or an extension is made.
- For new contracts, the requirements must be incorporated into contracts awarded on or after

November 14.

- Between October 15 and November 14, agencies must include the clause in their solicitation and are encouraged but not required to include it in contracts awarded during this time unless the solicitation for such contract was issued on or after October 15.

### **Next Steps for Employers**

Employers need to quickly assess whether their business is a federal contractor or subcontractor for purposes of the Order. If so, they will need to get into compliance by:

1. designating a person or persons to serve as COVID-19 Coordinator, and providing them with the proper resources and training;
2. implementing a mandatory vaccination policy, in which all employees must provide proof of vaccination prior to December 8, and which has procedures for handling reasonable accommodation requests; and
3. implementing the required masking and physical distancing policies at their workplaces, including effectively communicating those policies to all employees and visitors through signage and documentation.

### **For Questions/Compliance Assistance**

If you have any questions about the Guidance and the potential impact on your business or organization, please contact:

- Kathleen Berney ([kberney@hrwlawyers.com](mailto:kberney@hrwlawyers.com) / 617-348-4335)
- Pete Moser ([pmoser@hrwlawyers.com](mailto:pmoser@hrwlawyers.com) / 617-348-4323);
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- Any member of the [HRW Team](#) to discuss your particular situation.