

Miller & Chevalier

What Contractors Need to Know About the Vaccine Mandate

Jason Workmaster
Connor Farrell

November 12, 2021

Executive Order 14042

- Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors (Sept. 9, 2021)
 - Requires covered contractors to comply with guidance issued by the Safer Federal Workforce Task Force, which currently includes vaccine, masking, and physical distancing requirements for covered contractor employees and covered contractor workplaces
 - Covered contracts/contract-like instruments (broadly defined) are those for:
 - Services, construction, or a leasehold interest in real property;
 - Services covered by the Service Contract Act;
 - Concessions; and
 - Services in connection with Federal property or lands
 - Exceptions to coverage:
 - Grants;
 - Contracts/contract-like instruments/agreements with Indian Tribes;
 - Contracts/subcontracts equal to or less than the simplified acquisition threshold
 - Work performed outside the United States or its outlying areas; and
 - Subcontracts solely for the provision of products

FAR Deviation Clause

- FAR Deviation Clause 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (OCT 2021)
 - Sets forth the clause agencies can use to implement the requirement, including mandatory flowdown language to subcontracts for services over the simplified acquisition threshold
 - Requires implementing clause be included in:
 - New contracts awarded on/after Nov. 14, 2021;
 - New solicitations issued on/after Oct. 15, 2021;
 - Extensions/renewals of contracts and orders awarded on/after Oct. 15, 2021; and
 - Options on existing contracts and orders awarded on/after Oct. 15, 2021
 - Agencies are strongly encouraged but not required to include the clause in:
 - Contracts not covered by the Executive Order;
 - Contracts awarded prior to Nov. 14, 2021, on solicitations issued before October 15

Implementing Agency Deviations

- Civilian Agency Acquisition Council (CAAC)
 - Materially corresponds to FAR Deviation, including scope and timing
- Department of Defense (DoD)
 - Establishes DFARS Deviation Clause 252.223-7999
 - Materially corresponds to FAR Deviation
 - States only that DoD contracting officers “may” include the clause in solicitations/contracts in which the clause is not required

Implementing Agency Deviations

- GSA
 - Requires inclusion of FAR Deviation Clause in:
 - Federal Supply Schedule (FSS) contracts above the Micro-Purchase Threshold (MPT) (\$10,000 per FAR 2.101) for services **and products**
 - Blanket Purchase Agreements (BPAs) for new and existing orders
 - Government-Wide Acquisition Contracts (GWACs), Multi-Agency Contracts (MACs), and indefinite delivery, indefinite quantity (IDIQ) contracts
- VA, DHS, DOJ
 - Requires inclusion of FAR Deviation Clause in solicitations and contracts for services, including construction
- NASA
 - Requires inclusion of FAR Deviation Clause in commercial and non-commercial procurements for services, **supplies**, research and development, construction, and **end-items**

The Scope of Covered Employees and Workplaces

- Covered Contractor Employees
 - Work “on or in connection with” a federal contract or at a “covered contractor workplace.”
 - Work on the contract itself or provide necessary support for the covered contract.
 - Work full-time, part-time, or remotely.
- Covered Contractor Workplaces
 - Are controlled by a contractor working on a covered contract.
 - Are buildings or facilities where a covered employee is likely to be present during the performance of a covered contract.
 - Are not employee homes (for purposes of masking and social distancing).

The Requirements for Compliance with the Mandate

- Covered employees must be “fully vaccinated.”
 - By January 18, 2022 (for contracts that include the relevant clause before that date)
 - After January 18, 2022, by the first day of the period of performance on a newly awarded covered contract, exercised option, or extended or renewed contract when the clause has been incorporated into the covered contract
- Covered contractor workplaces must implement physical distancing and masking requirements.
 - Fully-vaccinated v. non-vaccinated employees
 - High or substantial v. low or moderate community transmission
- Covered contractors must designate a COVID-19 safety coordinator.

The Requirements for Compliance with the Mandate

- Contractors must make “good faith” efforts to comply with requirements
 - If challenges are encountered, contractors should work collaboratively with their contracting officer
- Contractors should determine the appropriate means of enforcement with respect to employees who refuse to get vaccinated
 - Education, counseling, accommodations, enforcement
- Failure to make “good faith” efforts could result in termination of contract, breach of contract claims, False Claims Act litigation, suspension and debarment

The Medical Condition and Religious Exceptions to the Requirement

- Contractors may grant vaccine and masking exceptions for
 - Disabilities (including medical conditions).
 - Sincerely held religious beliefs, practices, or observances.
- Contractors must determine whether an exception is appropriate.

Legal Challenges to the Mandate

- Several individual states and state coalitions, including Arizona, Florida, Texas, Oklahoma, Georgia, and Kentucky have sued in federal court seeking injunctions
- Argue that the Administration lacks the authority to require vaccinations and such mandates violate the Constitution
- Challenges are unlikely to succeed but could impact timing of implementation
- Contractors may be immune from suits brought pursuant to contractor's implementation of mandate
 - “Yearsley” immunity, Political Question Doctrine

OSHA Emergency Temporary Standard (ETS)

- Mandates employers with 100 or more U.S. employees require employees to be fully vaccinated or undergo weekly testing for COVID-19
- Does NOT apply to workplaces covered under the Safer Federal Workforce Task Force Guidance for contractors and subcontractors
- Federal contractors may have some workplaces subject to requirements for federal contractors and other workplaces subject to the OSHA ETS