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## *Task Force Issues Guidance on President Biden's Vaccine Mandate for Federal Contractors*

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As we previously [reported](#), President Biden issued an [Executive Order](#) on September 9, 2021, which requires certain government contractors to impose COVID-19 vaccine mandates on their workers. To implement that requirement, the EO ordered the Federal Acquisition Regulation ("FAR") Council to require a new contract clause in affected government contracts, and ordered the Safer Federal Workforce Task Force to publish guidance ("Task Force Guidance") on COVID-19 safety protocols for federal contractors. Under the Executive Order, once the FAR Council has issued the new clause (which will occur before October 15, 2021), "covered contracts" will include the clause and affected contractors must comply with the Task Force Guidance.

The Task Force Guidance (available [here](#)) was issued on September 24, 2021. It also includes FAQ.

### **What does the Task Force Guidance Require?**

The Task Force Guidance requires that all "covered contractor employees" be fully vaccinated for COVID-19 by December 8, 2021, unless the employee is entitled to an accommodation. Covered employees are required to present vaccination documentation. Notably, an "attestation of vaccination" by the employee "is not an acceptable substitute" for this documentation. Covered contractors are not required to provide vaccinations at the workplace, but should ensure their employees are aware of convenient opportunities to be vaccinated (such as through [www.vaccines.gov](http://www.vaccines.gov)).

Other highlights of the Task Force Guidance include:

- Covered contractors must ensure that all individuals, including employees and visitors, comply with CDC guidance regarding masks and physical distancing at a covered contractor workplace. Under current CDC guidance, unvaccinated individuals must wear masks in indoor public places and in certain outdoor settings (such as crowded settings or during activities that involve sustained close contact with other people who are not fully vaccinated). Vaccinated individuals must wear masks in indoor public places in areas of high or substantial community transmission. Masks are not required when an individual is alone in an office with floor to ceiling walls and a closed door, or for a limited time when eating or drinking and maintaining appropriate distancing of at least six feet.
- Covered contractors must designate at least one individual to coordinate implementation of, and compliance with, the Task Force Guidance. This individual also must ensure that

information on required COVID-19 workplace safety protocols is provided to employees and other individuals likely to be present at the workplace and that employees present proper vaccination documentation.

- The Task Force Guidance also applies to covered contractor employees who work remotely. Individuals working on a covered contract from their residence are covered contractor employees, and must comply with the vaccination requirement, even if the employee never works at a covered contractor workplace during the performance of the contract.

### **What is a Covered Contract?**

Temporally, “covered contracts” include:

- Contracts awarded on or after November 14, 2021. The new mandatory clause will be included in all solicitations issued after October 15, 2021, and contracts from such solicitations must include the clause. Between October 15, 2021 and November 14, 2021, agencies are encouraged to include the mandatory clause but are not required to do so unless the solicitation was issued on or after October 15, 2021; and
- Existing contracts that are subsequently extended or renewed, or for which an option is subsequently exercised, where such extension, renewal or option exercise occurs on or after October 15, 2021.

Substantively, “covered contracts” include:

- Procurement contracts for services, construction, or a leasehold interest in real property;
- Contracts for services covered by the Service Contract Act;
- Contracts for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. § 4.133(b); and
- Contracts with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

The Task Force Guidance elaborates that the definition of contract is broadly construed, and “includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental services agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing.” The Task Force Guidance continues, “[t]he term contract shall be interpreted broadly as to include, but not be limited to, any contract within the definition provided in the FAR at 48 CFR Chapter 1 or applicable federal statutes. This definition includes, but is not limited to, any contract that may be covered under any Federal procurement statute.”

FAR at 48 CFR Chapter 1, in turn, defines “contract” as “a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriate funds and that, except as otherwise authorized, are in writing.”

The Task Force Guidance further states that covered contracts “include[] contracts covered by the Service Contract Act, contracts covered by the Davis-Bacon Act, concessions contracts not otherwise subject to the Service Contract Act, and contracts in connection with Federal property or land and relating to offering services for Federal employees, their dependents, or the general public.”

Covered contracts specifically *exclude*:

- Grants;
- Contracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act;
- Contracts valued at or below the Simplified Acquisition Threshold (currently, \$250,000); and
- Subcontracts for the manufacturing of products.

There is some potential ambiguity regarding whether prime contracts for goods or supplies are covered contracts. The EO and the Guidance are focused on the four types of contracts identified above, although the Task Force Guidance encourages agencies to expand the reach to other contracts, and indicates in doing so that contracts for products are not covered. “Consistent with applicable law, agencies are strongly encouraged to incorporate a clause requiring compliance with this Guidance into contracts that are not covered or directly addressed by the order because the contract is under the Simplified Acquisition Threshold as defined in section 2.101 of the FAR or is a contract or subcontract for the manufacturing of products.”

### **Other Definitions**

“Covered contractors,” or parties to covered contracts, are responsible for ensuring that the required clause is incorporated into its first-tier subcontracts. First-tier subcontractors, in turn, are expected to flow the clause down to their lower-tier subcontractors in similar fashion.

“Covered contractor employees” are any full- or part-time employees of a covered contractor or subcontractor working on, or in connection with, a covered contract or working at a covered contractor workplace. Work performed “in connection with” a covered contract refers to employees “who perform duties 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[.]”

“Covered contractor workplace” is 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 of the covered contract. If a covered contractor employee is likely to be present during the performance of a covered contract on only one floor or a separate area of a building, facility, or site controlled by a covered contractor, other areas of the building, facility, or site constitute a “covered contractor workplace” unless the 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 performance of the contract. Along the same lines, if a covered contractor employee performs their duties in only one building, facility, or site on a campus controlled by a covered contractor with multiple buildings, facilities, and sites, the other buildings, facilities and sites are also considered a “covered contractor workplace” unless the contractor can affirmatively

determine that none of its employees at one building, facility, or site will come into contact with a covered contractor employee during the performance of the contract.

### Next Steps

Federal contractors who will be party to covered contracts on or after October 15, 2021 should implement steps to comply with the Task Force Guidance. These steps include:

- requiring proof of employee vaccination;
- fielding related requests for accommodation;
- implementing mask and physical distancing protocols consistent with CDC guidance; and
- designating at least one individual to oversee the implementation of these measures.

Federal contractors should also review their contracts to determine whether they are “covered contracts” under the Executive Order and Task Force Guidance. This requires a case-by-case analysis to determine whether the particular contract at issue is expressly included or excluded, or—where the answer is unclear—whether the federal contractor should nevertheless voluntarily choose to comply with the Executive Order, per the Task Force Guidance’s “strong[] encourage[ment]” to do so.



*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*

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