



Federal Contractor Vaccination Mandate: FAQs

Information for Construction, Transportation, Aerospace/Defense, and Other Industries

Last Friday, October 15, 2021, marked the date on which federal agencies were required to begin incorporating a clause compelling compliance with federal COVID-19 workplace safety protocols, including a vaccination mandate for covered workers, into certain existing and new federal contracts, as detailed in [guidance](#) issued by the Safer Federal Workforce Task Force on September 24, 2021, pursuant to [Executive Order 14042](#). Although plenty of legal and media commentary has been published on the overarching scope of these new requirements for federal contractors and subcontractors, many questions remain as to their exact timing, applicability, and recoupment of compliance costs. Here are some frequently asked questions and answers, with a particular focus on issues identified for industries where federal contracts are common, including construction and transportation.

1. What are the new workplace safety protocols that will be applicable to covered federal contractors and subcontractors?

Answer: All of the specific requirements are detailed in the Task Force's guidance, but the three major components are summarized as follows:

- **Mandatory COVID-19 vaccination of all covered contractor (and subcontractor) employees**, except in limited circumstances where an employee is legally entitled to an accommodation because of a medical condition or religious belief.
- Compliance by individuals, **including both covered contractor employees and visitors**, with masking and physical distancing requirements while in covered contractor workplaces.

- **Designation by covered contractors of one or more persons to coordinate COVID-19 workplace safety efforts** at covered contractor workplaces.

2. What federal contracts are subject to the new safety protocols, including the vaccination mandate?

Answer: [Executive Order 14042](#) identifies four broad categories of federal contracts and subcontracts subject to the workplace safety protocols:

- Procurement contracts of all kinds, including, but not limited to, those for goods, services, construction, or leaseholds in real property.
- Services contracts covered by the Service Contract Act, 41 U.S.C. §§ 6701, *et seq.* (which typically covers every federal contract entered into for the principal purpose of furnishing services in the United States through the use of service employees).
- Concession contracts (which typically grant a right to use federal property for furnishing services).
- Contracts entered into in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

The breadth of these four categories is sweeping, and the likely intent is to try to cover as many federal contractors as possible.

3. Are there any exceptions to the categories of covered federal contracts?

Answer: Yes. Even if a federal contract falls within one of the four categories summarized in response to Question 2 above, the new workplace safety protocols will not be required if the contract:

- Is a grant.
- Is with an Indian Tribe.
- Is a contract or subcontract that has a value that is equal to or less than the simplified acquisition threshold, as defined in Section 2.101 of the Federal Acquisition Regulation (generally, **\$250,000**).
- Involves work exclusively performed outside the United States.
- Is a subcontract solely for the provision of products (rather than services).

4. What is the compliance deadline for the vaccination mandate?

Answer: It depends. The guidance provides a general deadline of **December 8, 2021**, for covered contractor employees to be fully vaccinated. However, federal contractors and subcontractors will not be required to comply with the new workplace safety protocols until the clause obligating them to do so is incorporated into their existing or new covered federal contracts or subcontracts. As a result, the actual compliance deadline may vary.

5. My business has existing federal contracts. Are we required to ensure our employees are vaccinated by December 8?

Answer: Not necessarily. For covered contracts that were awarded prior to October 15, 2021, federal agencies are required to incorporate the workplace safety clause as soon as the contract is extended, renewed, or an option is exercised. According to the guidance, all covered contractor employees must be fully vaccinated "by the first day of the period of performance of an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract." Covered federal subcontractors will need to stay in close contact with the covered federal prime contractor to ensure they receive notice of when the clause is incorporated in the covered contract.

6. My business is in the running to be awarded a federal contract after October 15, 2021. Are we required to ensure our employees are vaccinated by December 8?

Answer: Not necessarily. Federal agencies were required to begin including the new requirements in any new solicitations for contracts starting on October 15. For covered contracts awarded between October 15 and November 14, federal agencies are encouraged but not required to include the clause unless the solicitation for the contract was issued on or after October 15. This means that if you are awarded a covered contract between now and November 13, it is possible that the new safety protocol clause will not be included in your contract. However, the guidance provides that the new requirements must be incorporated into all covered contracts awarded on or after November 14.

7. What if we cannot ensure that all of the employees working on or in connection with a covered federal contract are fully vaccinated by our applicable

compliance deadline?

Answer: You may be able to seek an exception. According to the guidance, if a federal agency has an “urgent, mission-critical need” for a covered contractor’s employees to begin working on a covered contract or at a covered workplace before becoming fully vaccinated, then the agency may approve an exception. However, “in the case of such limited exceptions, the covered contractor must ensure these covered contractor employees are fully vaccinated within 60 days of beginning work on a covered contract or at a covered workplace.” Moreover, the contractor must also ensure that such unvaccinated employees comply with masking and physical distancing requirements prior to being fully vaccinated.

8. Can federal contractors seek to recover compliance costs from the government?

Answer: It may depend. When the new requirements are imposed in connection with a bilateral change order on an existing federal contract, the contractor can likely include compliance costs as part of the consideration it requests in connection with the change order. However, this might not be an option for unilateral change orders issued by the government. For new contracts solicited after October 15, businesses bidding on the contracts are presumably expected to factor the anticipated costs of compliance into their bids.

9. Some but not all of our employees perform work in connection with covered federal contracts. Does our entire workforce need to be vaccinated anyway?

Answer: Not necessarily. Per the guidance, any employees that work on or in connection with a covered contract must be vaccinated, **including employees who work 100% remotely**. In addition, employees who do not work on or in connection with a covered contract but who work at a “covered contractor workplace” must also be vaccinated. The guidance defines “covered contractor workplace” to mean 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.

10. We have a construction job site where covered contract work is being performed. Does that mean the employees at our business headquarters must also comply

with the safety protocol requirements (including the vaccination mandate), in addition to those employees performing work at the actual job site?

Answer: It depends, but most likely yes. If employees at your headquarters perform work in connection with the covered contract or job site, such as administrative, payroll, or HR functions, then those employees are considered “covered contractor employees” who are subject to the new workplace safety protocol requirements. Additionally, the guidance states that “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 the covered contract,” then all of the other areas of that building constitute a “covered contractor workplace,” to which the requirements apply. This means that if employees who perform work on or in connection with a covered contract share restrooms, break rooms, or other communal office space with other employees, then the entire workplace is subject to the protocols, including the vaccination mandate.

11. Do the new requirements apply even when the covered contractor workplace is located in a state or municipality that prohibits compliance with any aspect of the protocols, such as a state that has banned employer vaccination mandates?

Answer: Yes, the Task Force takes the position that its safety protocol requirements for covered contracts “are promulgated pursuant to Federal law and supersede any contrary State or local law or ordinance.”

12. How far down the chain of subcontracts do the new requirements extend under a covered contract?

Answer: The primary contractor on a covered federal contract is responsible for ensuring that the clause requiring compliance with the Task Force’s workplace safety protocols is incorporated into its first-tier subcontracts. Those first-tier subcontractors, in turn, are responsible for incorporating the clause into their own subcontracts, and so on and so forth, such that ultimately “accountability for compliance is fully established throughout the Federal contract supply chain for covered subcontractor employees and workplaces at all tiers through application of the clause.” Keep in mind, however, that the Executive Order indicates that it does not apply to subcontracts whose value is equal to or less

than the simplified acquisition threshold, which is currently \$250,000.

13. Do the new requirements apply even if all of the work performed in connection with a covered federal contract is outdoors?

Answer: Yes. The Task Force states that its guidance “applies to contractor or subcontractor workplace locations that are outdoors.”

14. Can employees subject to the vaccination mandate “opt out” of it by electing to comply with a weekly testing requirement instead?

Answer: No. There is no alternative weekly testing option available for covered contractor employees.

15. Can covered contractor employees avoid the vaccination requirement if they can provide proof of a prior COVID-19 infection or COVID-19 antibodies?

Answer: No. The guidance states that covered contractor employees who have had a prior COVID-19 infection are still required to be vaccinated, and covered contractors cannot accept recent antibody tests in lieu of proof of vaccination.

16. What can we accept from employees as proof that they are fully vaccinated?

Answer: The guidance identifies several forms of documentation that can be accepted as proof of vaccination, including copies of any of the following:

- Immunization records from health care providers or pharmacies;
- COVID-19 Vaccination Record Cards published by the CDC;
- Medical records documenting vaccination;
- Immunization records from public health or state immunization information systems; or
- 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.

17. What requirements must we impose on visitors to our covered contractor workplaces?

Answer: Covered contractors are required to ensure that all individuals, including both their employees and visitors, comply with published CDC guidance for masking and physical distancing at any covered contractor workplace. This may include CDC guidance for specific settings and industries, such as healthcare, transportation, and education. When mask usage is required, the contractor is responsible for ensuring “appropriate masks” are worn both “consistently and correctly.”

In areas designated as having “high” or “substantial” transmission, the protocols generally require that fully vaccinated people wear a mask in indoor settings. In areas of low or moderate community transmission, fully vaccinated people do not need to wear a mask. There are no physical distancing requirements for fully vaccinated people regardless of the community transmission level.

In contrast, individuals who are not fully vaccinated must wear a mask indoors and in certain outdoor settings at covered contractor workplaces, no matter the current community transmission level. “To the extent practicable,” such individuals must also maintain a distance of at least six feet from others at all times.

Covered contractors are required to check the [CDC COVID-19 Data Tracker County View website](#) for community transmission information in all areas where they have covered contractor workplaces at least once per week.

18. What are the consequences for non-compliance with the new safety protocol requirements once they are imposed under an existing or new federal contractor?

Answer: That remains to be seen. Theoretically, a federal contractor or subcontractor that fails to ensure compliance with all of the new workplace safety requirements pursuant to a covered contractor could be found in breach of contract. Violations might also affect a contractor’s past performance ratings. Depending on the contract’s terms, non-compliance could also reduce the amount paid under the contract or, worse yet, result in the contract’s termination.

Bottom Line: While much remains to be determined as to how this federal contractor mandate will be enforced, the clear intent is broad applicability with real liability risks for covered contractors and subcontractors that do not comply.

This blog post was drafted by Spencer Fane Partners [Michelle Berger](#) (Denver), [Helen Holden](#) (Phoenix), Sonja McGill (Dallas), and [Randi Winter](#) (Minneapolis). For more information, please visit www.spencerfane.com.