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White House Guidance to Federal Contractors for Compliance With the Upcoming December 2021 Vaccine Mandate Deadline

The White House has released a new set of FAQs meant to provide flexibility to employers who are federal contractors and subcontractors in their efforts to satisfy the December 8, 2021 deadline for their employees to be fully vaccinated. These latest FAQs are intended to give some clarity while also grace to those contractors making good-faith efforts to reach compliance with new COVID-19 workplace safety protocols.

1. Are employees required to present proof of their vaccination status to an employer if the employer can access that information in another manner, in light of other laws guaranteeing privacy of such information?

   No. If an employer can access individual vaccination status directly from another source, such as through a state's immunization database or existing documentation from an employee vaccination program, the employer does not need to require its employees to present that documentation again.

2. Must all accommodation requests be resolved before an employee is permitted to begin his/her work for a Federal agency?

   No. Employees who have applied for an accommodation from vaccination can begin or continue working while that request is under review, as long as the employee follows workplace safety protocols for individuals who are not fully vaccinated as specified in the Task Force Guidance for Federal Contractors and Subcontractors.

3. What safety protocols apply on-site at a Federal workplace when an employee has received an acceptable accommodation from vaccination?

   In most circumstances, unvaccinated employees must follow applicable masking, physical distancing, and testing protocols. However, when heightened safety protocols are necessary, or the nature of the employee's responsibilities are such that no safety protocol other than a vaccination is adequate, an unvaccinated employee with an accommodation might be unable to perform his/her work on site. Still, in that instance, the employer's overarching obligation to perform its contractual deliverables remain in place.

4. Are the employees of an affiliate of the employer who are working at a covered workplace subject to the COVID-19 workplace safety protocols for Federal contractors established through the Task Force Guidance?

   Yes. An affiliate is a company of the Federal contractor if, directly or indirectly, (a) either one controls or has the power to control the other, or (b) a third party controls or has the power to control both. Factors demonstrating control include but are not limited to, interlocking management of ownership, identity of interests among family members, shared facilities and equipment, or common use of employees. Thus, an employee of an affiliate is subject to the Task Force Guidance if he/she performs work at a covered contractor workplace.

5. If the location where an employee works is owned, leased, or otherwise controlled by an affiliate of a contractor, and the employee works in connection with a covered contract, is that workplace subject to the Task Force Guidance?

   Yes. Again, the factors relevant to determining an affiliate of a contractor include but are not limited to, interlocking management of ownership, identity of interests among family members, shared facilities and equipment, or common use of employees. If an employee works in connection with a covered contract and is likely to be present during the performance of the contract at a worksite controlled by the affiliate, that workplace is subject to the Task Force Guidance.

6. What steps are required when an employee working for a contractor refuses to be vaccinated?

Employers have the flexibility to determine the means of enforcing the requirements for unvaccinated employees who refuse to comply or fail to request an acceptable accommodation, including the procedures the company has adopted for governing its workplace, such as an employee handbook or collective bargaining agreement. It is up to the employer to determine when an employee's continued refusal qualifies for enhanced disciplinary measures for non-compliance. In the instance when unvaccinated employees report to agency worksites, they must follow established safety protocols based on their vaccination status. A federal agency may deny entry for any unvaccinated employee to a Federal workplace, consistent with the agency's workplace safety protocols, irrespective of whether the employer's enforcement mechanisms have worked.

7. What happens if an employer cannot comply with all the requirements in the Task Force's Guidance for Federal Contractors and Subcontractors?

   As long as an employer has exhibited good faith efforts while encountering challenges towards full compliance with the COVID-19 workplace safety protocols, the Federal agency's contracting officer is instructed to work with the employer to address those challenges. Ultimately, if the employer is not taking sufficient steps towards full compliance, the employer may be at risk of having its Federal contract or subcontract terminated.

Bottom Line

In issuing these new FAQs, the Biden Administration appears to be acknowledging that December 8 was an unrealistic deadline for imposing sweeping vaccination mandates for federal contractors and subcontractors. While covered employers still face significant burdens to achieve compliance, they at least have additional time and flexibility to do so.

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