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WHITE HOUSE TASK FORCE ANNOUNCES NEW COVID SAFETY PROTOCOLS FOR FEDERAL CONTRACTORS

To Our Clients and Friends:

On Friday, September 24, the White House’s “Safer Federal Workforce Task Force” (“Task Force”) issued new guidance (the “Guidance”) regarding vaccination requirements and other COVID-safety measures for federal contractor employees. This Guidance implements President Biden’s Executive Order regarding COVID precautions for government contractors, issued September 9, 2021.

Key terms of the Guidance include a vaccination mandate for all covered employees of federal contractors, except in “limited circumstances” for workers “legally entitled” to accommodation. The vaccination mandate applies to covered employees working from home and who have recovered from COVID-19. There is no alternative for workers to present a weekly negative COVID test, as expected in the forthcoming Occupational Safety and Health Administration Emergency Temporary Standard (“OSHA ETS”) for large employers. Employers covered by both the Guidance and the OSHA ETS (i.e., federal contractors with 100 or more employees) would be held to this higher standard. The Guidance also directs masking and distancing practices in accordance with CDC guidelines.

This alert provides a brief overview of these and other provisions of the Guidance for contractors.

I. President Biden’s September 9 Executive Order Regarding Vaccinations for Employees of Federal Contractors

The Executive Order for federal contractors called for the Task Force, which the President established in January, to establish vaccination requirements for federal contractors by September 24.[1] The Order is effectuated by directing federal agencies to include a clause in contracts requiring “the contractor and any subcontractors (at any tier)” to “comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force,” “for the duration of the contract.”[2] Under the Order, this clause is to be included in new contracts and extensions and renewals of existing contracts, and “shall apply to any workplace locations . . . in which an individual is working on or in connection with a Federal Government contract.”[3]

The Order cited the Federal Property and Administrative Services Act (the Procurement Act) as authority for the new federal contractor mandate.[4] As noted in prior alerts, there is some question whether the Procurement Act authorizes the imposition of workplace safety standards in this manner, and legal challenges are possible.

II. Key Definitions

The Guidance defines the following key terms:

- A covered contractor is “a prime contractor or subcontractor at any tier who is party to a covered contract.”
- A covered contractor employee is “any full-time or part-time employee of a covered contractor (1) working on or in connection with a covered contract or (2) working at a covered contractor workplace.”
- An employee works “in connection with a covered contract” when he performs “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.
- A 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 for a covered contract. A covered contractor workplace does not include a covered contractor employee’s residence.”

III. Three Areas of COVID-19-Safety Protocols

The Guidance addresses three key safety requirements for covered contractors and subcontractors at all tiers, except for contracts which are “under the Simplified Acquisition Threshold as defined in section 2.101 of the FAR” and contracts or subcontracts “for the manufacturing of products.”^[5] The FAQs go on to state that these safety protocols do not apply to “subcontracts solely for the provision of products” and “covered contractor employees who only perform work outside the United States or its outlying areas.” Thus, the Guidance’s exceptions to the safety protocols largely do not expand or contract the scope of applicable contracts from the Executive Order.

(1) Vaccination:

The Guidance states that all covered contractor employees, including those who previously had COVID-19 as well as covered contractor employees working from home, must be fully vaccinated by December 8. The only exceptions are for employees who are “legally entitled to an accommodation” for medical or religious reasons.

A covered contractor is responsible for reviewing requests for accommodation and determining what, if any, accommodations to offer. Covered contractors are not responsible for providing vaccines to their employees (but may choose to do so), nor are they instructed to pay employees for the time and expenses associated with getting vaccinated (however, this may be a requirement of state and local law and is expected to be a requirement for large employers in the forthcoming OSHA ETS).

Contractors are instructed to review and verify, but not necessarily collect or store, documents to ensure that their employees are fully vaccinated. Acceptable documents include physical or electronic CDC cards, state health records, or private medical records. Unacceptable documents include positive antibody tests and attestations that an employee is vaccinated.

Agencies have discretion to grant temporary exemptions from the vaccine requirement when there is “an urgent, mission-critical need” to have contractors begin work before becoming fully vaccinated. Even then, employees must be fully vaccinated within 60 days of beginning work on the contract. They also must adhere to physical distancing and masking requirements for unvaccinated workers in the meantime.

(2) Physical Distancing and Masks:

Contractors must ensure that all employees and visitors present in covered contractor workplaces follow CDC guidance pertaining to physical distancing and masks. Fully vaccinated employees do not have to physically distance, but unvaccinated employees should maintain six feet of distance from others whenever practicable.

In areas of high community transmission (as determined by the CDC), everyone, including visitors, whether vaccinated or not, must wear masks indoors. In areas of low community transmission, only the unvaccinated must wear masks indoors (they also must wear masks outdoors in certain circumstances). Contractors are responsible for checking the CDC’s website weekly to determine the transmission rate of the local community. When the transmission rate increases, additional safety measures are effective immediately. When the transmission rate decreases to a low or moderate level, safety measures can be removed after two consecutive weeks at that lower level.

These mask mandates apply in all shared spaces and common areas. They do not apply in enclosed office spaces or when individuals are eating or drinking and maintaining appropriate distancing. Contractors can create exceptions to the mask mandate for situations where masks can burden breathing or otherwise pose a safety concern as determined by a workplace risk assessment. And the mask requirements do not apply when employees are working remotely from their residences.

As with the vaccination requirement, employers must review and consider what, if any, religious and medical accommodations to the mask requirement they must offer.

(3) Implementation:

All covered contractors must designate a COVID-safety coordinator. The coordinator is an employee responsible for coordinating, implementing, and enforcing compliance with the Guidance. The coordinator must provide relevant information about the Guidance to employees and visitors likely to enter a covered contractor workplace. The Guidance is silent as to whether a coordinator is required for each worksite or whether a single coordinator can fulfill these responsibilities for more than one worksite.

IV. Relationship to Other Federal and State Mandates

The Guidance purports to apply in all states and municipalities, even those that prohibit employers from imposing vaccination, mask, and distancing requirements. It claims to supersede any contrary state laws and local ordinances. It does not, however, excuse covered contractors from complying with stricter measures imposed by state and local governments. The Guidance also says that agencies may impose additional safety requirements on covered contractor employees while present on federal property.

The Guidance states that all contractors must comply with its COVID-19 protocols, even those employers that will also be subject to the forthcoming OSHA ETS. As we previously explained, the ETS—which is anticipated within weeks of September 9—is expected to require all employers with 100 or more employees to ensure that their workforce is fully vaccinated or to require any workers who remain unvaccinated to produce a negative test result at least weekly before coming to work. However, the Guidance for contractors states that “[c]overed contractors must comply with the requirements set forth in this Guidance regardless of whether they are subject to other workplace safety standards,” such as the forthcoming ETS. Given that the Guidance does not indicate that employees can undergo regular COVID testing in lieu of being vaccinated (and in fact does not mention testing at all), large employers who are also federal contractors will not be able to avoid a vaccination requirement by relying on the ETS testing option.

Finally, new contracts must state that if the Safer Federal Workforce Task Force updates its Guidance to add new requirements, those requirements will apply to existing contracts.

[1] Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>.

[2] *Id.* § 2.

[3] *Id.*

[4] *Id.* (citing 40 U.S.C. 101 *et seq.*).

[5] The Executive Order exempted “(i) grants; (ii) contracts, contract-like instruments, or agreements with Indian Tribes...; (iii) contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold, as that term is defined in section 2.101 of the Federal Acquisition Regulation; (iv) employees who perform work outside the United States or its outlying areas, as those terms are defined in section 2.101 of the Federal Acquisition Regulation; or (v) subcontracts solely for the provision of products.” Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors.



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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, or any of the following in the firm's Administrative Law and Regulatory, Labor and Employment or Government Contracts practice groups.

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