

# LABOR AND EMPLOYMENT LAW

## INFORMATION MEMO

OCTOBER 5, 2021

### Task Force Issues Federal Contractor COVID-19 Safety Protocol Guidance

On Sept. 24, 2021, the Safer Federal Workforce Task Force published [guidance](#) related to President Biden's [Executive Order 14042](#) "Ensuring Adequate COVID Safety Protocols for Federal Contractors."

Executive Order 14042 (the Order) generally requires federal agencies and executive departments to ensure that covered contracts and contract-like instruments include a clause that requires covered contractors (and subcontractors) to comply with COVID-19 safety protocol guidance published by the Safer Federal Workforce Task Force, including as it may be updated in the future.

Specifically, the guidance requires that federal contractors and subcontractors with a covered contract conform to the following workplace safety protocols:

1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
2. Compliance by individuals, including covered contractor employees and visitors, with the guidance related to masking and physical distancing while in covered contractor workplaces; and
3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

The Order is clear that it applies to any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument, if:

- i. it is a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property;
- ii. it is a contract or contract-like instrument for services covered by the Service Contract Act, 41 U.S.C. 6701 *et seq.*;
- iii. it is a contract or contract-like instrument for concessions; or
- iv. it is a contract or contract-like instrument entered into 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.

This Order also clearly states that it **does not** apply to:

- i. grants;
- ii. contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act;

- iii. contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold (which is currently \$250,000);
- iv. employees who perform work outside the United States or its outlying areas; or
- v. subcontracts solely for the provision of products.

The guidance provides a very broad definition of “contract or contract-like instrument” that follows the definition under the U.S. Department of Labor’s proposed rule regarding minimum wage for federal contractors, which includes, but is not limited to “awards, notices of awards, job orders or task letters...letter contracts, orders such as purchase orders...exercised contract options, and bilateral contract modifications.”

There is a phased-in timeline for compliance with the new requirements under the Order. Agencies are required to incorporate the new clause requiring compliance with the COVID-19 safety protocol guidance generally as follows:

- in new contracts awarded on or after Nov. 14, 2021;
- in new solicitations issued between Oct. 15, 2021 and Nov. 14, 2021;
- in extensions or renewals of existing contracts and orders awarded on or after Oct. 15, 2021; and/or
- in options on existing contracts and orders exercised on or after Oct. 15, 2021.

While the current guidance does not appear to apply to existing contracts where performance is ongoing, the guidance nevertheless “encourages” agencies to incorporate the clause into existing contracts or in other contracts that are not otherwise directly covered by the Order. However, employers should bear in mind that if an existing contract or contract-like instrument is renewed, extended, or if an option is exercised on or after Oct. 15, 2021, the clause will be required to be incorporated at that time and the new requirements will then apply.

Most notably, covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19 by Dec. 8, 2021 unless the employee is entitled to an accommodation for medical reasons (contraindication) or sincerely held religious belief. After Dec. 8, 2021, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and/or by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract. The guidance defines “covered contract employee” as “any full-time or part-time employee of a covered contractor working on or in connection with a covered contract **or** working at a covered contractor workplace...includ[ing] employees of covered contractors who are not themselves working on or in connection with a covered contract.” (emphasis added). The vaccine mandate applies to all of the covered contractor’s employees at “workplace locations” where covered employees are likely to be present.

According to the guidance, the requirements from the Order must be flowed down to lower-tier subcontractors by the prime contractor and higher-tier subcontractors, but only until the point where the subcontract requirements are solely for the provision of products.

On Sept. 30, 2021, the Federal Acquisition Regulatory Council published additional [guidance](#) for agencies, which included the contract clause developed to be incorporated into applicable contracts and subcontracts pursuant to the Order.

The biggest takeaway from the guidance and Order seems to be that this is intended to be far reaching. Employers who are federal government contractors or subcontractors should carefully review their existing contracts, any new solicitations or new contracts including “contract-like instruments” to determine if they will be covered by the new executive order and guidance. However, employers should also be prepared for agencies to exercise their discretion to incorporate the clause in contract and contract-like instruments that are not otherwise covered by the Order or in existing contracts before renewal, extension, or any option is exercised. Accordingly, employers should work with counsel to evaluate and prepare for compliance with the new requirements as may be appropriate or prudent.

If you have any questions or need Bond’s help, please contact [Stephanie Fedorka](#), any [attorney](#) in Bond’s [Labor and Employment practice](#) or the Bond attorney with whom you are regularly in contact.

