

Locke Lord QuickStudy: The Guidance for Mandatory Vaccination of Federal Contractors and Subcontractors Has Arrived

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The Safer Federal Workforce Task Force recently issued its COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (the “Guidance”) implementing President Biden’s [Executive Order 14042](#) (the “Order”). In sum, the Guidance requires covered federal contractors and subcontractors to ensure their covered employees are fully vaccinated for COVID-19 by December 8, 2021, unless a certain employee requires a religious or medical accommodation. Federal contractors and subcontractors must also ensure employees and visitors are following masking and physical distancing rules, among other safety precautions. The Guidance is one more step the federal government has taken in furtherance of President Biden’s [six-pronged COVID-19 Action Plan](#) (the “Plan”).

We have summarized the key points of the Guidance below.

Covered Contractors:

A federal contractor or subcontractor only becomes subject to the Order and Guidance upon entering a contract or contract-like instrument with a federal agency that provides the contractor or subcontractor must comply with all guidance published by the Safer Federal Workforce Task Force. At that point, the employer will be considered a “covered contractor.”

- For existing contracts that were awarded prior to October 15, 2021, the requirements will be incorporated when an option is exercised or an extension is made.
- Between October 15, 2021 and November 14, 2021, agencies are required to include the requirements in any contract solicitation. If a contract is awarded during this time and the solicitation was issued prior to October 15, 2021, the agency is encouraged to, rather than required to, include the requirements in the contract.
- For new contracts awarded on or after November 14, 2021, the requirements must be included in the contract.

The Order carves out exceptions for some categories of federal contracts and subcontracts. For example, subcontracts solely for the provision of products are not required to incorporate the vaccine requirement. Contracts or subcontracts whose value is equal to or less than \$250,000 are also generally not required to incorporate the vaccine requirement. However, President Biden strongly encourages agencies to incorporate

vaccination requirements into all contracts, meaning contractors and subcontractors that may technically be excepted from the Order should still review future contracts and amendments for the vaccination requirement.

Covered Contractor Employees:

Once the employer becomes a “covered contractor,” an employee will be subject to the requirements and considered a “covered contractor employee” if the employee works on or in connection with a covered contract **or** works at a covered contractor workplace. This includes employees who work remotely.

An employee is considered to be working “in connection with” the contract if the employee is performing duties necessary to the performance of the covered contract, such as human resources, legal, and accounting.

The definition for a covered contractor employee is very broad because it also includes employees working in “covered contractor workplaces” who are not themselves working on or in connection with a covered contract. If the location is controlled by the covered contractor and there is an employee working on or in connection with the covered contract anywhere in the workplace, it is considered a “covered contractor workplace.” FAQs issued by the Safer Federal Workforce Task Force explain that, even if there is only one covered contractor employee present at the workplace and he or she is only on one floor of the building, the entire building may be considered a covered contractor workplace if there is any chance that the covered contractor employee could come into contact with another employee in a lobby, elevator, stairwell, parking garage, or other area. Moreover, if the covered contractor has multiple buildings and the covered contractor employee only works in one of the buildings, the other buildings may still be considered a covered contractor workplace if the covered contractor employee could come into contact with an employee from another building in, for instance, the parking garage.

Requirements:

- **Mandatory Vaccination**—All covered contractor employees must be fully vaccinated by December 8, 2021, with the exception of those covered contractor employees who have been granted a medical or religious exemption. For contracts that are newly awarded, include an exercised option, or are extended or renewed after December 8, 2021, the covered contractor employees will have until the first day of contract performance to become fully vaccinated.
 - Notably, there is not a testing alternative and there is no exemption for individuals who previously had COVID-19.
 - Covered contractors are responsible for reviewing each covered contractor employee’s proof of vaccination (digital copies/photos are acceptable). Neither an attestation of vaccination status nor a proof of antibodies will serve as acceptable proof of vaccination.

- **Required Masking and Social Distancing Measures**—All individuals, including visitors, must comply with CDC’s guidance for masks and social distancing while at a covered contractor workplace (excluding a remote employee’s residence). This includes the requirement to wear a mask in areas of high or substantial transmission (regardless of vaccination status). However, fully vaccinated individuals do not need to physically distance, regardless of the level of transmission in the area. In order for a covered contractor to lessen the safety precautions, such as masks for vaccinated employees, the area must remain at a level of moderate or low transmission for at least two consecutive weeks.

- Covered contractors must check the [CDC COVID-19 Data Tracker County View](#) website for community transmission information in all areas where they have a covered contractor workplace at least weekly to determine proper workplace safety protocols.
- Even in areas of low or moderate transmission, unvaccinated individuals, including visitors, must wear a mask indoors (including in shared workspaces, such as an open floorplan office space and cubicle embankments) and in crowded outdoor settings or during certain outdoor activities that involve close contact with other unvaccinated individuals.
- Covered contractors are required by law to consider requests for accommodations based on medical or religious exemptions as to masks and social distancing.
- Covered contractors may provide exceptions to mask wearing and/or physical distancing requirements consistent with CDC guidelines, for example, 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. Covered contractors may also provide exceptions for covered contractor employees engaging in activities in which a mask may get wet; high intensity activities where covered contractor employees are unable to wear a mask because of difficulty breathing; or activities for which wearing a mask would create a risk to workplace health, safety, or job duty as determined by a workplace risk assessment. Any such exceptions must be approved in writing by a duly authorized representative of the covered contractor.
- Covered contractors should note that the mask requirements are stricter than those previously imposed under various state laws in that the mask must be deemed acceptable for use under the [CDC's guidance on Types of Masks](#), which specifically excludes single layer fabric masks, thin fabric masks that do not block light, and face shields worn without a mask.
- **Designated COVID-19 Coordinator**—Covered contractors must designate one or more employees to coordinate COVID-19 workplace safety efforts at each workplace. This designee will be responsible for obtaining each covered contractor employee's proof of vaccination and will also be responsible for conveying the requirements to all covered contractor employees and visitors. The requirements should be conveyed by email, websites, memoranda, flyers, or other means **and** by posting signage at the entrances of covered contractor workplaces.
- **Conflicts of Law**—The Guidance supersedes any contrary State or local law or ordinance.

What's Next:

The Department of Labor's Occupational Safety and Health Administration ("OSHA") is next up in furthering President Biden's Plan as many expect OSHA will issue its anticipated Emergency Temporary Standard (the "ETS") in the coming weeks. It is expected that the ETS will require all employers with 100 or more employees to ensure their employees are vaccinated or tested weekly.

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