

## Mandatory Vaccines: Does Your Business Work on Government Contracts?

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On September 9, 2021, President Biden announced his plan to increase the number of vaccinated Americans. His Path Out of the Pandemic plan included an Executive Order requiring all employees of federal government contractors to be vaccinated along with an Executive Order with a directive to the Occupational Safety and Health Administration (OSHA) to establish Emergency Temporary Standards (ETS) requiring all employers with 100 or more employees to either confirm full vaccination of their workforces or test them weekly.

While the OSHA ETS has yet to be released, the Safer Federal Workforce Task Force recently released guidance on the Executive Order regarding federal contractors. This guidance provides greater detail regarding the scope of the Executive Order, what contracts are covered, and the timeline for federal contractors to comply.

### **Coverage**

The Executive Order applies to prime and subcontractors at any tier who work on covered contracts or contract-like instruments. Contract and contract-like instruments include but are not limited to “a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them.” This includes procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement with the federal government.

### **ATTORNEYS**

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### **PRACTICE AREAS**

Employee Benefits and ERISA

Employment and Labor

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The guidance specifies that the Executive Order covers the following groups of employees:

- Full-time or part-time employees of federal contractors who are working on or in connection with a covered contract or working at a covered contractor workplace. The guidance defines employees who work “in connection with” a covered contract as employees who perform duties that are necessary to performance under the contract but don’t directly engage in the work called for in the contract. This broad net can include personnel such as human resources, billing, and legal review.
- Employees who work remotely are covered if they work on a covered contract from their residence.
- Employees who aren’t working in connection with a covered contract are covered as long as they are working at a covered contractor workplace, which is a location controlled by the contractor where an employee of that contractor that is working on or in connection with a covered contract is likely to be present.

Employees who are not covered include:

- Employees who do not work at a covered contractor workplace and thus are fully segregated from employees working on federal contracts, who are not themselves working on or in connection with a government contract.
- Employees who receive a medical or religious exemption from the vaccination requirement.

The Executive Order also does not cover:

- Contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act.
- Contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold (\$250,000).
- Employees who perform work outside the United States or its outlying areas.
- Subcontracts solely for the provision of products.

### Timeline

The guidance provides that covered contractors must ensure that all covered contractor employees have been fully vaccinated no later than January 4, 2022. However, this deadline is nuanced. Specifically, this deadline applies to any new contracts and contract-like instruments, renewals and extensions of existing contracts or contract-like instruments, and the exercise of options on existing contracts or contract-like instruments, but will not automatically impact existing contracts or contract-like instruments.

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For contracts awarded before October 15, 2021, where the performance on the contract is ongoing, these requirements must be incorporated into the contract when an extension is made or an option is exercised by including a clause specifying that the contractor and any subcontractors will comply with all guidance published by the Safer Federal Workforce Task Force. Agencies are encouraged to include this clause in contracts awarded between October 15, 2021, and November 14, 2021, and they must include this clause in all solicitations during that time. Agencies must contain a clause including these requirements in all new contracts awarded on or after November 14, 2021.

On the first day the performance of the contract starts, covered contractors must have contractor employees provide them with some type of documentation to prove that they have received the second dose in a two-dose series (Pfizer-BioNTech, Moderna, or AstraZeneca) or a single dose of the Johnson & Johnson/Janssen vaccine. Employees are considered to be fully vaccinated two weeks after their last shot. Contractors will need to designate an individual to ensure that the contractor complies with and properly implements this new guidance.

### **Masks and Physical Distancing**

Covered contractors will need to ensure that employees and visitors comply with CDC guidance at covered contractor workplaces. This means fully vaccinated individuals do not need to wear a mask in areas of low to moderate community transmission but do need to wear a mask in areas of high or substantial community transmission. Visitors and individuals who have been granted a medical or religious exemption and aren't fully vaccinated must wear a mask and maintain a distance of at least six feet in all indoor and certain outdoor settings.

### **Remaining Questions**

The new guidance has left some questions unanswered. The guidance did not address whether booster shots will be required in the future to maintain compliance. The guidance also did not identify the penalties associated with failing to abide by the Executive Order or the guidance by not including the required contractual clauses in contracts moving forward or verifying that the appropriate employees are vaccinated. Penalties could range from fines to termination of the contract, but have not been established at this time.