

Jonathan Aronie
jaronie@sheppardmullin.com
202.747.1902

Ryan Roberts
reroberts@sheppardmullin.com
202.747.2187

Nikole Snyder
nsnyder@sheppardmullin.com
202.747.3218

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The wait is over. Earlier today, the President's COVID Task Force [issued its short-awaited Guidance to federal contractors](#) following the very recent publication of Executive Order 14042 (Ensuring Adequate COVID Safety Protocols for Federal Contractors) (the "EO"). For those of you hoping the guidance would make it easier for you simply to say your whole company is covered, you're in luck. For those of you hoping to avoid the reach of the new rule, that goal just became harder to achieve.

The Executive Order is 14 pages, and includes a few general statements, three specific requirements, and multiple Q&As. We will put together a more detailed overview this weekend – and supplement our prior guidance – but wanted to get a few highlights out to you all this evening.

Here are the key take aways to carry you into the weekend:

1. The basic safety requirements are not surprising: Vaccines, masking, and distance.

Broadly, the guidance requires vaccinations (with certain limited exceptions), proper masking, and physical distancing.

To ensure compliance, all Covered Contractor Employees must be fully vaccinated by **December 8, 2021** (unless entitled to a legal accommodation). After December 8, all Covered Contractor Employees must be fully vaccinated by the first day the clause is incorporated into your contract(s) (e.g., the period of performance for a new contract, the first day of the period of performance on an exercised option or extended/renewed contract when the clause has been incorporated into the covered contract, or the first day the Government issues a modification to your contract incorporating the clause).

There are two types of exceptions for vaccinations – religious exceptions and disability/medical exceptions. The guidance also includes an exception for an urgent or mission-critical need for a Covered Contractor to have Covered Contractor Employees begin work on a Covered Contract or in a Covered workplace prior to being fully vaccinated (but, such employee must get fully vaccinated within 60 days thereafter).

Keep in mind, these exceptions are different than "opting out." The guidelines do not allow individuals to opt-out of the vaccination requirements by providing proof of a negative COVID test, proof of prior Covid infection, or positive results from an antibody test.

The guidance also requires Covered Contractors to follow the CDC's guidelines for masking and physical distancing at a Covered Contractor Workplace (including indoor and outdoor facilities). All individuals, including employees and visitors, must comply with published CDC guidance for masking and physical distancing at a covered contractor workplace. The applicable guidelines depend on whether the Covered Contractor Workplace is located in an area of high or substantial community transmission. These guidelines also vary (i.e., are less stringent) depending on whether an individual is fully vaccinated.



2. The definition of a “covered contractor” still is limited to services contractors (maybe).

Consistent with the EO, the guidance defines a “Covered Contractor” as any prime or subcontractor (at any tier) who is a party to a contract that contains the clause requiring compliance with the guidance. As written, the Guidance continues to limit its scope to services contracts covered by the SCA/DBA or services provided under concession and real property contracts.

A literal reading of the Guidance leaves three types of contracts apparently NOT covered by the rule:

- (a) Contracts exclusively for the manufacture or sale of products,
- (b) Contracts for non-labor services (such as data hosting, internet service, and the like), and
- (c) Contracts for exclusively non-SCA services (i.e., executive/professional services from salaried employees not covered by the SCA).

If you have a contract — even only one contract — that goes beyond these three categories, then it appears you’re covered by the rule.

However, we must offer two significant caveats here.

First, there’s evidence in the text of the Guidance that the Task Force intended the Guidance to apply to *all* services contracts, not only those covered by the SCA/DBA (e.g., that the definition of a contract includes “any contract that may be covered under any Federal procurement statute.”) Coupled with President Biden’s stated intent for the Executive Order to cover as many Americans as possible, the forthcoming FAR Council proposed rule to be released October 8th could adopt a broader scope and mandate the inclusion of the clause in *all* services contracts.

Second, the guidance “strongly encourages” agencies to incorporate a clause requiring compliance with the guidance into contracts that are **not currently covered** by the EO, for example, contracts under the Simplified Acquisition Threshold or a “contract or subcontract for the manufacturing of products.” Thus, no one should get too excited about falling within one of the likely exclusions above as that excitement could come to a crashing halt if your agency submits to this official “encouragement.”

3. The rule extends the reach of the EO to almost all employees of most large government contractors.

The EO made clear that employees who work on or in connection with a covered contract are covered by the rule. We noted in our prior analysis that the Government is likely to read “in connection with” broadly. The new guidance suggests we were right. The guidance makes clear it covers direct-bill employees working on a covered contract, as well as employees who perform duties necessary to the performance of such contract, “such as human resources, billing, and legal review.” That’s right — legal. Thus, most of you reading this are within the scope of the guidance if you have a covered contract.

Perhaps the most prominent expansion of the EO, however, is the new term “Covered Contractor Workplace.” 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.” That’s worth repeating: If an employee who is working on or supporting a covered contract is “likely” to enter a facility, the whole facility is covered by the rule and everyone who works in it must get vaccinated and follow all other applicable COVID safety rules.

In short, the guidance covers three groups of employees:

- (a) Employees working on a covered contract,
- (b) Employees supporting (broadly defined) a covered contract, and
- (c) Employees working in a location in which an employee covered by (a) or (b) is “likely” to visit.

There is a theoretical carve out for facilities that can be fully separated from a covered employee (including common areas, elevators, and even parking lots), but that carve out does not seem particularly practical for most companies.

The guidance also clarifies that even if such employees are working remotely – *including from their own homes* – they still are required to be fully vaccinated. (Although, you will be happy to know you do not have to wear a mask or maintain social distance from your loved ones as those rules explicitly do not reach into your homes).

Thus, it appears the only service contractor employees not within the reach of the Guidance are those working directly and exclusively for commercial customers and who do not visit any company facilities that Covered Employees visit. It’s likely most contractors can count the members of this group on one hand. To understand why, consider this: If you’re an in-house counsel or HR rep at a company with covered contracts and you are responsible for periodically visiting your company facilities nationwide, *all* employees at *all* of those facilities will be covered under this rule because you work “in connection with” covered contracts.

4. Contractors must review actual proof of vaccination from their employees – and visitors.

The guidance makes clear that contractors cannot simply post posters and advise their employees to follow the rules. The guidance clearly places upon the contractor the obligation to “ensure compliance.” To facilitate this internal policing, the guidance requires contractors to appoint a COVID safety coordinator, who will be responsible for providing updated information on the workplace protocols to employees and visitors, and ensuring compliance with such protocols.

With regard to vaccinations, the coordinator (or other contractor employee) will have to review the vaccine documentation of their covered employees. This means a Covered Contractor cannot simply rely upon an employee’s self-certification – it must review some proof of vaccination. Acceptable documentation can be provided in hard copy or digital format (*e.g.*, a scanned PDF or photo or the original documentation), and certain copies are permissible.

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There obviously is more to say here, but it’s Friday night and our families are wondering what’s so important that it was worth delaying dinner. We will circulate a more comprehensive update, and supplement our prior analysis, in the next few days. Also, we will be presenting a webinar for the Coalition for Government Procurement later this coming week. We will send along details once we have them.

In the meantime, as always, don’t hesitate to call if you want to discuss anything.

-Jonathan, Ryan, Nikki