

Alert

September 16, 2021



What Federal Contractors Need to Know About the Biden Administration's Vaccine Mandate

On September 9, 2021, President Biden announced an executive order (EO) that expands upon the administration's goals of requiring both federal employees and contractors and subcontractors working in connection with federal contracts to receive a vaccine against COVID-19. The new requirements are much more aggressive than the administration's safety protocols previously issued on July 29, which only required verification of vaccination status or testing for government employees and onsite contractors. The new EO eliminates the testing option and expands the vaccine requirement to **all** federal contractors regardless of whether they have employees working on federal property. This presumably would include remote employees if they work on qualifying contracts.

What Does the EO Actually Say?

Importantly, the EO itself does not mandate vaccines for federal contractors or place any other obligations on federal contractors yet. It only requires contractors to adhere to all forthcoming guidance issued by the task force, with very limited exceptions. But it is expected that the task force will issue such guidance very soon.

Specifically, the EO requires federal agencies to insert a contract clause, to be created by the Federal Acquisition Regulation (FAR) Council, that specifies that "the contractor or subcontractor (at any tier) shall, for the duration of the contract, **comply with all guidance for contractor or subcontractor workplace locations published by the Task Force.**" It is anticipated that the guidance from the task force, and resulting FAR clause, will include a vaccination requirement for all federal contractors subject to the SCA, regardless of locality.

When Will This Happen?

The EO requires the task force to provide definitions, explanations of protocols, and any possible exceptions by **September 24**. The guidelines must be approved by the director of the Office of Management and Budget (OMB). In response to the EO, OMB has already stated, "if you want to do business with the Federal Government, you must vaccinate your workforce."

The FAR Council must take "initial steps" to implement the EO's policy with acquisition offices by **October 8**. This includes amending the FAR to provide for the new contract clause. This new clause will then be effective for all new contracts, solicitations, renewals/extensions, or options entered on or after **October 15, 2021**, with limited exceptions.

Which Federal Contractors Will This Apply To?

The new rules will apply to any new contract or new contract-like instrument, including a new solicitation, extension, or renewal or exercise of an option, provided it is:

- a procurement contract for services, construction, or a leasehold in real property;
- a contract covered by the Service Contract Act (SCA);
- a contract for concessions, including concessions excluded generally under the SCA; or
- a contract in connection with federal property or lands offering services for federal



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Related Practice Areas

- Government Contracts

employees, dependents, or the general public.

Contracts that are expressly **not** covered include:

- grants;
- Indian Tribes contracts or contract-like instruments;
- those with a value equal to or less than the FAR simplified acquisition threshold (currently \$250,000 per FAR 2.101);
- agreements involving employees performing work outside the United States; and
- subcontracts solely for the provision of products.

This apparently means the EO covers only services contracts above certain thresholds that are covered by the SCA, and not products contracts (interpreted to mean supplies or goods).

The EO also applies to “subcontractors (at any tier)” to executive-agency contracts for services, but subcontracts solely for the provision of products would similarly be exempt, as are services subcontracts not subject to the SCA or equal to or below the FAR simplified acquisition threshold. Although further guidance is expected on this issue, the EO is presumably intended to cover mixed services/products contracts and subcontracts.

What Should We Do Now?

All federal contractors should carefully review the EO and look out for an update from the task force due on September 24. Additionally, contractors should use this time to evaluate the status of their current contracts, subcontracts (including flow-down provisions), and contracting opportunities, including upcoming contract extensions, renewals, options, or new solicitations that will be effective on or after October 15, 2021, when the new FAR clause will be implemented. Contractors should also begin to identify those employees who work on or “in connection with” your federal contracts since they will be presumably covered by the new rules. Finally, if they have not done so already, federal contractors and subcontractors should begin to consider whether and how they are going to require employees to provide proof of vaccination and how that will be collected and maintained.
