

Federal Contractors' Alert: What We Know and Still Don't Know About Biden's Vaccination Mandate

Article

Amundsen Davis COVID-19 Alert

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On September 24, 2021, as instructed by President Biden's Executive Order 14042, the Safer Federal Workforce Task Force ("Task Force") published its COVID-19 Workplace Safety for Federal Contractors Guidance. We first updated you on this Executive Order in our blog published on September 13: Who is a Federal Contractor for Purposes of the Biden Vaccine Mandate? But does the Task Force's new guidance actually assist us in determining what federal contractors are covered under the Executive Order? Unfortunately, certainty as to who is covered by the Executive Order remains clear as mud. However, the Task Force did make the following clear for contractors with its new guidance:

1. The guidance and the Executive Order's Section 5 defines what contracts fall under the mandate. The term "services" is not defined in the Executive Order or in the Task Force's guidance and the definitions remain broad. This is where many businesses will find themselves left in the dark to navigate this edict. Of course, Section 5 also includes specific exclusions, which are fairly limited. For example, there is no mention of banks that serve as a depository of Federal funds, or are an issuing and paying agent for U.S. savings bonds and notes. In light of the broad definitions adopted by the Executive Order and guidance – such banks could fall under this mandate (but, we are not 100% certain by the definitions given to us). Moreover, we are also not certain that FDIC status alone is a sufficient trigger as this is not discussed in the guidance either.
2. Those federal contractors who are covered must have a COVID-19 safety plan in place at their workplaces. This includes mask requirements (and face shields alone do not count) as well as written social distancing rules not only for employees, but visitors as well. The safety plan must be properly

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published and communicated. The safety plan must also have a designated person or team of persons in charge of the plan.

3. COVID-19 vaccination is required by December 8, 2021 for covered contractor employees (including employees of covered contractors who are not themselves working on or in connection with a covered contract). Contractors are required to get proof of vaccination from all covered employees.
4. Reasonable accommodations must be considered for medical reasons or due to religious objections – and if accommodations are provided, there is nothing preventing the employer from implementing weekly testing. Indeed, wouldn't an employer implement such testing as part of its COVID-19 mitigation plan?
5. Remote contract workers must be vaccinated too since they are covered contractor employees, but the masking and social distancing requirements to do not come into play at the employee's residence since it's not a covered workplace.
6. Federal agencies are encouraged to insert the vaccine mandates included in the Executive Order in all federal contracts, including those under Section 5's list of excluded contracts. So businesses better be on the lookout for any contractual obligations inserted in federal contracts or subcontracts on this issue going forward, and should not assume the mandate does not apply to them.

As noted above, masks and physical distancing are required and all individuals in the covered workplace must comply with CDC guidance for masking and physical distancing. If required to wear a mask, it must be worn in all common areas and shared workspaces. Similar with vaccines, employers must consider exemptions to the mask mandate for disability reasons or religious beliefs. As for wearing a mask, it differentiates for vaccinated vs. unvaccinated:

- Fully vaccinated must wear a mask in indoor settings, unless they are in an area of low or moderate community transmission, then they do not have to wear a mask. They do not have to physical distance at all regardless of the level of transmission.
- Unvaccinated must wear a mask indoors and in certain outdoor settings, regardless of the level of community transmission. "To the extent practicable" they must maintain a distance of at least six feet from others at all times. The outdoor setting where masks are required is for outdoor activities that involve "sustained close contact with other people who are not fully vaccinated, consistent with CDC guidance."

Community transmission levels can be found on the CDC website and must be checked at least weekly to determine proper workplace safety protocols.

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Lastly, the Task Force finally provided additional guidance with FAQs. Notably, those employees who had COVID-19 previously are still required to be vaccinated. An antibody test cannot replace getting vaccinated. Also, multi-floor establishments and the ability to keep contract employees completely separate is an option so non-contract employees would be excluded from the vaccination mandate. And, yes, this guidance applies to small businesses as well since coverage under the federal contractor mandate is not dependent on the size of the employer.

There is likely more to come. Before entering into any new federal contract, or an extension of any existing contract, employers should take a look to see if any of these requirements have been added to the contract. Finally, seek competent legal counsel to opine on whether the mandate applies to your particular business or operation.

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