

ALERT

Federal Agencies Roll Out Class Deviations for Contractor Vaccination Requirements

October 6, 2021

WHAT: The Federal Acquisition Regulatory Council, Civilian Agency Acquisition Council, and several agencies have issued class deviations and related instructions for implementing Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Workers. These publications include the FAR clause to be used in the near term, FAR 52.223-99. (The Department of Defense issued its own mirror-image clause, DFARS 252.223-7999). These issuances follow from the EO and implementing guidance that we have covered here and here.

WHEN: The FAR Council's instructions were dated September 30, and individual agency instructions are continuing to post into this week. These issuances arrived early, as EO 14042 had not required them until October 8.

WHAT DOES IT MEAN FOR INDUSTRY: The FAR and DFARS clauses add no substantive guidance. Instead, they cite EO 14042, direct contractors to follow the Safer Federal Workforce Task Force's guidance, and require flowdown to covered subcontracts.

More insight into implementation comes from the agencies' class deviations and associated instructions. These documents provide a glimpse into how the agencies will approach two key areas of uncertainty for contractors: incorporation of the vaccine mandate into existing contracts and application (if any) to contracts excluded by EO 14042. (Recall that the Safer Federal Workplace Task Force "strongly encourages" incorporation into contracts excluded by the EO.) Although most defer questions of incorporation to more operational levels, the General Services Administration's instructions stand out for their length and specificity of instructions for the variety of contract

Authors

Craig Smith
Partner
202.719.7297
csmith@wiley.law

Practice Areas

Government Contracts

types administered by the agency.

As individual components and contracting activities issue their instructions, contractors may notice trends in approaches to incorporation. Overall, these directions are trending towards (a) incorporating the clause in all existing solicitations; (b) incorporation in all new awards; and (c) general tendency to incorporate in existing contracts or orders issued under existing contracts. (Indeed, one contracting office advised IDIQ-holders that refusing the clause would render them ineligible for new orders.) These instructions have used broad language (e.g., “all contracts”), though it is perhaps too early to infer a clear trend when it comes to contracts for products and those under the simplified acquisition threshold. Notably, at least one agency instruction did request that contractors take time now to estimate the costs of compliance—a consideration as important for modifying existing contracts as it is for pricing new contracts.

Links to documents posted as of October 6, 2021 are below:

- FAR Council instructions
- Civilian Agency Acquisition Council class deviation
- Department of Defense class deviation
- General Services Administration class deviation and instructions; draft modification to Multiple Award Schedule
- Department of Justice class deviation
- Department of Homeland Security class deviation
- National Aeronautics and Space Administration class deviation
- Millennium Challenge Corporation class deviation

The MCC’s class deviation is a reminder that EO 14042 extends beyond executive agencies and departments to independent agencies, so contractors should continue to think broadly in monitoring their federal customers for potential EO 14042 coverage.

Visit our COVID-19 Resource Center