

ALERT

Notable Updates on EO 14042 Compliance From the Safer Federal Workforce Task Force

November 2, 2021

WHAT: On November 1, 2021, the Safer Federal Workforce Task Force further updated its frequently asked questions to address several issues concerning the scope of Executive Order (EO) 14042 and the timelines for covered contractors' compliance with the EO's vaccination mandate.

The most significant new item for employers grappling with EO 14042 compliance is likely the Task Force's express recognition of the significant challenge's contractors face in meeting the December 8 deadline for covered employees to be fully vaccinated or have an accommodation.

The new guidance echoes recent comments from the White House that contracting agencies should work cooperatively with contractors that have been "working in good faith" and have "encounter[ed] challenges" with applying the EO 14042 protocols:

Q: What steps should an agency take if a covered contractor does not comply with the requirements in the Task Force's Guidance for Federal Contractors and Subcontractors?

A: Covered contractors are expected to comply with all requirements set forth in their contract. Where covered contractors are working in good faith and encounter challenges with compliance with COVID-19 workplace safety protocols, the agency contracting officer should work with them to address these challenges. If a covered contractor is not taking steps to comply, significant actions, such as termination of the contract, should be taken.

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As for individual employees, the Task Force has added guidance that contractors may (but are not obligated to) take interim steps such as educating workers who have not been fully vaccinated rather than terminating them for failure to comply with the mandate by the December 8 deadline:

Q: What steps should a covered contractor take if a covered contractor employee refuses to be vaccinated?

A: A covered contractor should determine the appropriate means of enforcement with respect to its employee at a covered contractor workplace who refuses to be vaccinated and has not been provided, or does not have a pending request for, an accommodation. This may include the covered contractor using its usual processes for enforcement of workplace policies, such as those addressed in the contractor's employee handbook or collective bargaining agreements.

One model for enforcement among employees with respect to non-compliance with a vaccination requirement is that being followed by Federal agencies. Guidance for Federal agencies is to utilize an enforcement policy that encourages compliance, including through a limited period of counseling and education, followed by additional disciplinary measures if necessary. Removal occurs only after continued noncompliance. Guidance for Federal agencies is that employees should not be placed on administrative leave while the agency is pursuing an adverse action for refusal to be vaccinated but will be required to follow safety protocols for employees who are not fully vaccinated when reporting to agency worksites.

During the time period of enforcement, the covered contractor must ensure the covered contractor employee at a covered contractor workplace is following all workplace safety protocols for individuals who are not fully vaccinated.

An agency may determine that a covered contractor employee who refuses to be vaccinated in accordance with a contractual requirement pursuant to EO 14042 will be denied entry to a Federal workplace, consistent with the agency's workplace safety protocols.

This language is similar to the Task Force's guidance for the Government's own employees.

Additionally, the guidance reiterates that accommodations offered by covered contractors must be sufficient to constitute effective compliance with the health and safety focus of the EO and that there may be instances where the Government restricts site access to fully vaccinated individuals only, even if a covered contractor has granted an employee's request for accommodation from the vaccination requirement. Notably, the guidance includes a statement that covered contractors "should generally notify their contracting officers when one of their employees who works onsite at a Federal workplace has received an exception to the requirement to be fully vaccinated" so that agencies may assess the appropriateness of safety measures for contractor employees in Federal workplaces—though contractors should have protocols in place to ensure any such communications are in compliance with applicable privacy obligations.

The updated guidance also covers several questions likely to be of note to contractors (the responses below are paraphrases of the full Q&A responses):

- Do accommodation requests need to be processed before December 8, 2021?
 - Covered contractors may continue to evaluate pending accommodation requests after December 8 so long as they require their covered employees to abide by appropriate workplace safety protocols (e.g., testing, masking, and social distancing).
- Are employees of corporate affiliates of a covered contractor that would not otherwise qualify as a covered contractor included within the scope of EO 14042?
 - Yes, if the covered contractor controls or has the power to control the affiliate (or if the reverse is true), the affiliate's employees who work at a covered contractor workplace would be considered covered contractor employees.
- Is a worksite that is owned by a covered contractor's affiliate considered a covered workplace?
 - Yes, if a covered contractor employee is likely to be present in a facility where they perform work for a covered contractor, the workplace is considered a covered contractor workplace.

Practical Considerations: Contractors should continue to review the Safer Federal Workforce Task Force guidance carefully and regularly. The new guidance should help contractors who have been inundated with challenges arising out of the need to implement the EO as December 8, 2021 quickly approaches. The guidance also suggests that contractors' good faith efforts to comply with the mandate will be a major consideration for agencies and contracting officers. Accordingly, it remains important to document each step of the process of compliance carefully.

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