

ALERT

Updates to the Safer Federal Workforce Task Force's Guidance for Contractors Aim to Provide Some Clarity Concerning Accommodations

October 25, 2021

WHAT: On October 21, 2021, the Safer Federal Workforce Task Force posted new Q-and-A guidance relevant to contractors covered by Executive Order (EO) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors. The new guidance focuses on a relatively narrow set of issues contractors might encounter as they review their covered workers' requests for accommodations related to the Executive Order.

Contractors can review the updated guidance by following this link, clicking on the "Vaccination and Safety Protocols" tab, and reviewing the Q-and-A entries marked "New."

The new guidance does not add to the obligations covered contractors already have concerning their efforts to ensure compliance on EO 14042's accelerated timelines, and most of the updates compile information and recommendations from the Centers for Disease Control and Prevention (CDC) and others in the medical and scientific communities.

The new guidance includes, among other things:

- A directive that contractors must set timelines for covered workers whose accommodation requests were denied to, after denial, get fully vaccinated. The guidance does not suggest a timeline, though presumably there must be enough time to complete a two-shot vaccination cycle followed by another two weeks to meet the definition of "fully vaccinated."

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- A cross-reference to a non-exhaustive list of circumstances in which the Centers for Disease Control and Prevention recommends delaying COVID-19 vaccinations, such as delay for 90 days after receiving monoclonal antibodies or convalescent plasma for COVID-19 treatment. (As a reminder, the guidance already states that vaccination requirements apply to covered employees with prior COVID-19 infections and that recent antibody tests are not a basis for establishing vaccination status.)
- Reference to CDC guidance concerning individual medical histories that could provide a contraindication for COVID-19 vaccination: "Severe allergic reaction (e.g., anaphylaxis) after a previous dose or to a component of the COVID-19 vaccine; and Immediate allergic reaction of any severity to a previous dose or known (diagnosed) allergy to a component of the COVID-19 vaccine."
- Citations to recommendations from the CDC and other medical organizations for people who are pregnant, breastfeeding, or trying to become pregnant now or in the future.
- A directive that individuals who establish a basis to delay vaccination must, if working on or in connection with a covered contract (or are covered for being co-located with those who are) during the delay in vaccination, follow applicable masking and physical distancing protocols in the guidance for workers who are not fully vaccinated. Although not stated expressly, this direction presumably applies to workers who, as noted above, have accommodation requests denied and then start the process to become fully vaccinated.

Additionally, the guidance repeats the critical point that there may be circumstances in which masking and distancing may not be sufficient to protect health and safety, such that a worker who is not fully vaccinated cannot be present at a covered worksite (even if the employer has granted the worker's request for accommodation). The guidance adds that in such scenarios, contractors are not relieved "from meeting all contractual requirements." The circumstance where the government contends that vaccination is the only way to comply with the Executive Order and bars an unvaccinated worker who is from a covered worksite is a challenging workforce-management scenario, especially given the tight deadlines by which contractors must ensure compliance with the new clauses that are being added to their existing contracts. That possibility highlights how important it will be for contractors to reserve their rights to seek an equitable adjustment in any bilateral modifications incorporating the EO 14042 obligations.

Practical Considerations: Contractors should review the new guidance carefully, as EO 14042 and its implementing clauses (FAR 52.223-99 and DFARS 252.223-99) state that covered contractors must adhere to the protocols on the Task Force website as it is updated. The guidance provides some helpful considerations concerning medical accommodations based on recommendations from the CDC and other medical professionals. Still, it is essential to balance that advice against practical considerations and existing legal obligations. So, for example, while the guidance clarifies that the CDC does not recommend that pregnant women delay vaccination, contractors must be mindful of their obligations under the Americans with Disabilities Act and the Rehabilitation Act. Accordingly, to the extent a worker's treating physician provides a signed certification instructing a pregnant worker to delay vaccination based on the physician's evaluation of the worker's medical history, contractors should be wary of attempting to override that certification based on the guidance and the CDC's recommendations alone. Contractors must continue to be careful and thoughtful

as they work to implement the Executive Order while processing their workers' accommodation requests, and we recommend close consultation with legal counsel concerning both issues as questions arise.

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