

Government Contracting Requirements and Issues Under Executive Order 14042—Vaccine Mandates

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

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Authority

Executive Order 14042 directs executive departments and federal agencies to include a clause in new contracts, and to modify current contracts, requiring contractors and their subcontractors to comply with all guidance published by the White House Safer Federal Workforce Task Force (“Task Force”). On September 24, the Task Force released [guidance](#) (the “guidance”) **setting a December 8, 2021 deadline** for employees of federal contractors (with very limited exceptions) to get vaccinated against the coronavirus. The Federal Acquisition Regulatory (FAR) Council followed up on September 30 with a [memo](#) on implementing the mandate. Immediately following issuance of the FAR Council Memo, the Civilian Agency Acquisition Council (CAAC) issued a Class Deviation, expressly authorizing civilian agencies to issue their own deviations to implement the Order. GSA, for one, immediately [issued](#) a Class Deviation that ignored the Executive Order’s distinction between service contracts and those solely for products. DoD issued its own class deviation on October 1, but as discussed below the requirements placed on contracts by the DoD are substantially similar.

Requirements

The proposed FAR 52.223-99 and DFAR 252.223-7999 clauses are substantially similar and essentially require contractors to follow the guidance put forward by the Task Force. The expansive definitions in the guidance apply the requirements to as many contractor employees as possible. This includes mandating “full” vaccination against COVID-19 for any person working on **or in connection with** a covered contract or working at a **covered contractor workplace**. This broad definition would include an employee that performs work in no way remotely concerning a government contract but performs the work from a site controlled by a contractor.

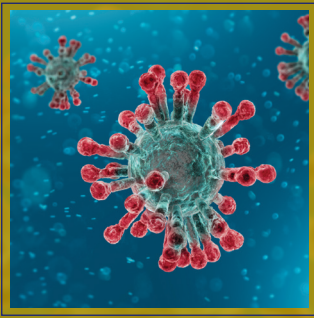
The guidance also requires social districting and wearing of masks in accordance with the CDC’s guidance. The only exception to these requirements is covered employees working from their homes remotely. Of note, the vaccine requirements still apply to remote workers if they are working on or in connection to a covered contract. What is considered a covered contract is equally broad. The Executive Order states that contracts/subcontracts under the Simplified Acquisition Threshold (SAT) and subcontracts solely for products will **not be** required to comply in Section 5(b)(iii). However, the guidance interpreting the order states “agencies are strongly encouraged” to place the requirements on these contracts regardless. Therefore, all contractors and subcontractors should anticipate a clause requiring compliance with the guidance.

While various agencies have begun asking for evidence that contractors are complying with the mandate, this is not required in the guidance. Instead, contractors “must ensure” that its covered employees are vaccinated by verifying the vaccinated status and then to flow the requirement down to its subcontractors, whom in turn must also flow the requirements down until it reaches only contracts for products. Notably, there is no requirement that the



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contractor require proof from its subcontractor that the requirements have been met, this would include 1099 status single employee subcontractors.

The deadline for compliance with these requirements is **December 8, 2021**. Logically, in order to be fully vaccinated by this date workers must begin the process before the compliance date. Fully vaccinated is defined as: two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single-dose vaccine. New contracts are required to include the applicable clause while current contracts must include the clause at the next option period. Agencies are strongly encouraged to incorporate the clause into ongoing contracts immediately and therefore contractors should expect these requires before their next option year. In brief, this raises a potential issue where the contractor must act to comply with a requirement that is not yet in their contract. Should that compliance conflict with a state law, as discussed below, the contractor is in a difficult position.

Ongoing Issues

Accommodations

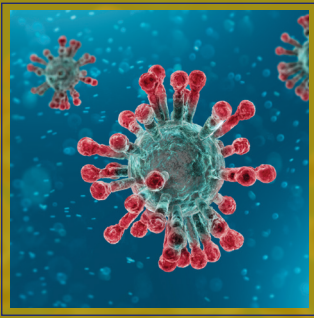
Executive Order 14042 states that the vaccine requirement applies, “except in limited circumstances where an employee is legally entitled to an accommodation.” The guidance clarifies that the contractor is responsible for making this determination and those accommodations are limited to a disability or because of a sincerely held religious belief. Disability accommodations related to vaccines should be handled as if any other typical medical accommodation request made by an employee and should be processed to ensure compliance with the Americans with Disability Act. Religious requests are considered far more difficult for most employers to properly process. While employers are permitted to inquire into an employee’s request for religious accommodation, this inquiry should be as limited as possible and focus on 1) is the belief prohibiting the vaccination *sincere* and 2) is the belief or practice *religious* as opposed to political or secular. Given the political nature surrounding vaccine requirements, many employers will face refusals based on sincere beliefs, but in no way originating from a protected religious source. In this scenario a contractor is obligated to deny the request in order to stay compliant with the requirements.

Importantly, even if an accommodation is granted and the employee is not required to receive a vaccine, the contractor may face additional issues. Agencies may prohibit travel or entry into their facilities based on vaccination status. If an employee cannot receive a vaccination and is required as an essential function of their position to enter an agency site that prohibits them, the contractor is lawfully permitted to replace them to avoid an undue burden-i.e. defaulting on their contract. If the contractor cannot relocate the employee to other work, that employee could receive the accommodation *and* be terminated.

Anticipated Conflicts

While litigation is ongoing regarding the enforceability of the vaccine mandates, and its conflicts with state laws, contractors are in the safest position to follow their agency customer’s instruction. Hypothetically, contractors could face fines at the state level for doing so. It is also possible contractors face a labor shortage due to enforcement of the mandate impacting their contracts. Where possible, make efforts to track and record these costs in any form. Given the costs flow from a change made by the government client, it is possible these costs could be submitted in a Request for Equitable Adjustment once they are fully realized. Notably, this is only applicable if a contractor is following a clause actually incorporated into their contract. Therefore, contractors should encourage contracting officers to





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perform the modification rather than vaguely reference the guidance in informal communication.

As with most of the COVID-19 legislation and regulation, additional guidance is likely forthcoming. NECA will update these resources, as necessary. Please seek competent legal or human resources advice for assistance with any specific factual scenarios.

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