CLIENT ALERTS & INSIGHTS

Vaccination and Masking Requirements For Federal Contractors Announced By The Safer Federal Workforce Task Force

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On September 24, 2021, the Safer Federal Workforce Task Force issued its "Guidance for Federal Contractors and Subcontractors," (the "Guidance") setting forth the COVID-19 safeguards that are to be required of federal contractors pursuant to President Biden's executive order (the "Order") announced earlier in September. Federal agencies generally must include a clause mandating compliance with the Guidance by both prime contractors and all tiers of subcontractors in new or renewed contracts beginning on October 15, 2021. Federal contractors and subcontractors should review their contracts or contract solicitations to determine if and when the Guidance has been incorporated.

Vaccine Mandate

The Guidance includes a wide-reaching vaccine mandate. Key questions addressed by the Guidance include:

What employees are covered? The Guidance broadly requires that the following employees be fully vaccinated on or before **December 8, 2021** unless they qualify for a disability or religious accommodation: (1) all employees working "on or in connection with" the applicable federal contract (including remote workers), and (2) all employees that work at a worksite where at least one employee works on or in connection with a federal contract, regardless of whether those employees are themselves working on the contract.

What does it mean to be "fully-vaccinated"? Employees are considered to be fully-vaccinated two weeks after having received the second dose in a two-dose series (i.e., Pfizer and Moderna vaccines), or two weeks after they have received a single-dose vaccine (i.e., the Johnson & Johnson vaccine). Thus, employees must have received their last shot on or before November 24, 2021 in order to meet the Guidance's deadline.

What must employers do to confirm vaccination status? Employers may not just rely on an employee's unsubstantiated affirmation that they have been vaccinated. Employers must require employees to show or provide official documentation (i.e., CDC vaccination card) confirming that the employees are fully vaccinated. Digital copies of such documentation (digital photograph, scanned image, etc.) are acceptable. There is no specific requirement that employers maintain copies of these documents, although employers need to consider how they would prove compliance in the case of an audit.

Must employers consider disability or religious accommodations? Yes. The Guidance provides that federal contractors must comply with the Americans with Disabilities Act and Title VII and provide reasonable accommodations to employees who are not vaccinated against COVID-19 because of a disability or because of a sincerely held religious belief. The Guidance further states that it is up to the federal contractor to consider the accommodation request and determine what accommodation, if any, must be offered. The Guidance offers no further direction as to what types of accommodations would be "reasonable" in this context, including no limiting as to the scope of appropriate accommodation requests.

What about states that seek to prohibit compliance? Per the Guidance, the Order and Guidance supersede any contrary state or local law, rule, order, etc. Of course, if there is a more protective state law, rule, order, etc., federal contractors still must comply with that/those provision(s).

Masking Requirement

The Guidance also requires that federal contractors comply with the CDC's most recent guidance for masking and physical distancing. This includes, but is not limited to, all employees and visitors (regardless of vaccination status) wearing masks in indoor settings in areas of high or substantial community transmission unless an employee is in a private, enclosed office. Unvaccinated employees and visitors must wear masks regardless of community transmission, including in certain outdoor settings. Contractors must review the CDC's data tracker website at least weekly for community transmission information, and even if a high/substantial level is reduced, must maintain certain protocols until that reduction is sustained for at least two consecutive weeks. Please see our article on the CDC guidance for more information.

Designation of COVID-19 Workplace Safety Coordinator

A final requirement in the Guidance is that federal contractors must designate an individual (or multiple individuals) to coordinate implementation of and compliance with the Guidance. The coordinator will be responsible for communicating the Guidance's requirements and the contractor's other safety protocols to the contractor's employees and visitors to the contractor's covered worksites.

The Biden Administration's directive to its agencies is to push the Guidance through its contracts as widely as possible. Federal contractors should anticipate that clauses mandating the Guidance will be incorporated into their new or renewed contracts in the near future. And federal subcontractors should expect their prime contractor partners to take steps to confirm compliance. Although the Guidance is silent with respect to the consequences of non-compliance, covered contractors who fail to adhere to the Guidance will be in breach of their contractual obligations to the government (or their prime contractor partner(s)). Such a breach, both practically and legally, could have a significant impact on a contractor's federal government work. As such, employers who are or are considering doing business with the federal government (whether as a direct contractor or subcontractor) should closely review and plan on implementing the Guidance.

Please reach out to Benesch's Labor & Employment Practice Group for more information.

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