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Top 10 Takeaways from Federal Contractor and Subcontractor Vaccine Mandate

*By David T. Hickey and Amba M. Datta**

The Safer Federal Workforce Task Force has issued guidance implementing President Biden's Executive Orders pertaining to the COVID-19 action plan with respect to federal government contractors. Covered contractors must immediately be prepared to implement the Task Force guidance. This article summarizes the top takeaways for government contractors in this rapidly developing area.

President Biden issued two executive orders requiring federal employees and federal contractor employees to get vaccinated against COVID-19. As part of his broad “Path Out of the Pandemic” COVID-19 action plan, the president also directed the Department of Labor’s Occupational Safety and Health Administration to develop an Emergency Temporary Standard requiring private employers with 100 or more employees to ensure their workforce is fully vaccinated or mandate unvaccinated workers to undergo weekly testing. Similar mandates were issued covering certain health care workers, federal employees and uniformed military personnel.

Following the issuance of the federal contractor vaccine mandate contained in Executive Order 14042 (“the EO”), the Safer Federal Workforce Task Force (“Task Force”) led by the White House COVID-19 Response Team issued guidance (“the Guidance”) implementing the EO with respect to federal government contractors on September 24, 2021. Importantly, the Task Force’s website also includes “Frequently Asked Questions” providing additional guidance to federal contractors on implementing the EO, and requiring monitoring by contractor compliance personnel.

On September 30, the Federal Acquisition Regulatory Council issued a contract clause requiring contractors and subcontractors at any tier to comply with the guidance published by the Task Force and recommended that federal agency acquisition offices exercise their authority to develop Federal Acquisition Regulation (“FAR”) deviation clauses implementing the Task Force’s guidance. The Civilian Agency Acquisition Council, Department of Defense and General Services Administration have issued class deviation clauses as well incorporating the Task Force’s guidance.

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Since the EO, the Task Force Guidance, and contract clauses were issued, legal challenges have been filed in federal court by over two dozen states challenging the legality (procedurally and constitutionally) of the mandate. This has complicated an already difficult compliance landscape for contractors and subcontractors of all sizes. Multiple federal district court judges have issued injunctions against enforcement of the mandate. As of this writing, a nationwide preliminary injunction is in place as a result of a December 7 preliminary injunction issued by the U.S. District Court for the Southern District of Georgia, which is under appeal by the Justice Department. As a result, the Task Force and individual contracting agencies have announced that the mandate will not be enforced pending the outcome of these federal cases. In addition, the Department of Defense issued a new class deviation indicating that contracting officers would not include the contract clause in new DoD solicitations or new contracts and orders and would not amend existing contracts or order to incorporate the class deviation clause.

Regardless of the current state of court proceedings, covered contractors must be prepared to implement the Task Force Guidance. This article summarizes the top takeaways for government contractors in this rapidly developing area.

1. BOTTOM LINE

The federal contractor vaccine mandate applies broadly to require federal contractor employees on covered contracts, those who perform duties in connection with a covered contract, and those working at the same workplace as covered employees, to be fully vaccinated from COVID-19. The Guidance also requires contractors to comply with masking and physical distancing requirements while in a covered contractor workplace and assigns responsibility for compliance to a designated individual tasked with coordinating implementation of workplace safety protocols at covered contractor workplaces.

2. TIMING

Employees must be vaccinated no later than January 18, 2022 (as of the November 10, 2021 Guidance), or by the first day of performance of a covered contract, option exercise, or renewed contract when a clause requiring compliance with the Guidance has been incorporated into a contract. The clauses (and therefore the Guidance) will be incorporated as follows:

- In new federal contracts or contract-like instruments awarded on or after November 14, 2021;
- In existing contracts for which options are exercised or extensions are issued;
- In new solicitations issued on or after October 15, 2021, and contracts

awarded pursuant to those solicitations (this includes new solicitations issued on or after October 15, 2021 for orders awarded pursuant to those solicitations under existing indefinite-delivery contracts).

(As of this writing, these dates have been suspended due to court orders).

3. COVERED CONTRACTORS

The vaccine mandate, masking and social distancing requirements apply to federal contractors that hold contracts or “contract-like instruments” for services, construction, leases, licenses, permits and agreements to perform work relating to federal property or lands. There are no exceptions for commercial item contracts and the term “contract” includes all contracts and subcontracts at any tier.

4. INAPPLICABLE TO CERTAIN CONTRACTS AND GRANTEES

The mandate does not apply to:

- Grants.
- Contracts or subcontracts below the simplified acquisition threshold, currently \$250,000 (however, the Guidance encourages agencies to incorporate clauses requiring compliance with the Guidance into contracts under the threshold).
- Contracts or agreements with Indian Tribes.
- Contracts if performance is outside the United States or its outlying areas.

5. APPLICABLE TO CERTAIN SUPPLY CONTRACTS

Currently, the contract clauses are not required to be included in contracts or subcontracts for supplies. The class deviations issued by the Civilian Agency Acquisition Council and Department of Defense, as well as the FAR clause, limit the vaccine requirement to contracts and subcontracts “for services, including construction.”

However, significantly the GSA class deviation will require contracting officers to incorporate the FAR clause in all new and existing Federal Supply Schedule (“FSS”) contracts above the micro-purchase threshold, including contracts that are solely for products. The GSA stated that it is not administratively feasible to distinguish FSS contracts that are solely for products from FSS contracts that are primarily for products but also include ancillary-type services (e.g., installation, maintenance, training, ancillary services acquired via the Order-Level Materials SIN, etc.). As a result of GSA’s deviation, the clause will be included in Schedule Contracts, many Blanket Purchase Agreements (“BPAs”), Government-wide Acquisition Contracts (“GWACs”),

Multi-Agency Contracts (“MACs”) and Agency-specific indefinite delivery, indefinite quantity (“IDIQ”) contracts, including those exclusively for products.

As the Task Force suggested, other agencies and contracting officers will likely incorporate the clause and its vaccine requirement in contracts for products as well. As a result, at this time, generally the mandate does not extend to contractors or subcontractors only providing products if they fall outside of the GSA deviation. Moreover, this issue remains subject to change because, although the Guidance excluded contracts and subcontracts “for the manufacturing of products” from the mandate and the EO exempted subcontracts “solely” for the provision of products, the Task Force guidance strongly encourages agencies to incorporate the clause into contracts that are solely for products.

6. SCOPE OF COVERAGE FOR EMPLOYEES WORKING ON OR IN CONNECTION WITH A COVERED CONTRACT

The vaccine mandate applies to any full-time or part-time employee of a covered contractor working on or in connection with a covered contract. The “in connection with language” is broad and includes employees who are indirectly engaged in performing the specific work called for by the covered contract, such as human resources, billing and legal review. Significantly, individuals working on a covered contract remotely from their residences are still subject to the vaccine mandate even if they never work at a covered contractor workplace or a federal government building. However, the masking and physical distancing portions of the Guidance do not apply to an individual’s residence.

7. SCOPE OF COVERAGE APPLIES TO EMPLOYEES WORKING AT A COVERED WORKSITE

The broad application of the mandate extends to any workplace locations controlled by a contractor or subcontractor where an employee of the covered contractor or subcontractor working on or in connection with a covered contract is likely to be present during the period of performance. If a covered contractor employee is likely to be present in any area of a building, site (indoors or outdoors), facility, or office campus controlled by a covered contractor or subcontractor, the covered contractor or subcontractor must apply these rules to all areas and persons working in those areas unless it can affirmatively determine that there will be no interaction between covered contractor employees and other persons at the site. This means that contractor employees working in a covered contractor workplace are likely subject to the vaccine mandate regardless of whether they are working on or in connection with a covered contract by virtue of the fact that they could come into contact

with a covered contractor employee in a worksite's common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas and parking garages.

8. DETERMINING IF A WORKER IS FULLY VACCINATED

Employees are “fully vaccinated” two weeks after their final dose from a one- or two-dose series of COVID-19 vaccines approved for regular and emergency use by the U.S. Food and Drug Administration or the World Health Organization. An employee's attestation of vaccination, proof of prior infection, or an antibody test are not sufficient proof of vaccination. Instead, covered contractors must verify employee vaccination status by collecting digital or hard copies of an immunization record from a healthcare provider or pharmacy, a COVID-19 Vaccination Record Card, medical records documenting the vaccination, immunization records from a public health or state immunization information system, or other official documentation detailing the type of vaccine administered, date(s) of administration, and the name of the healthcare professional or clinic site that administered the vaccine.

9. MASKING AND SOCIAL DISTANCING REQUIREMENTS IN ADDITION TO VACCINATION

Covered contractors must ensure that all individuals, including covered employees and visitors, comply with published Centers for Disease Control and Prevention (“CDC”) guidance for masking and social distancing at covered contractor workplaces. The guidance specifically requires that in areas of high or substantial community transmission (as defined by the CDC), all persons—including those fully vaccinated—must wear masks indoors. Fully vaccinated persons in low or moderate community transmission areas (as defined by the CDC) do not need to wear masks indoors. However, people in any work setting who are not fully vaccinated—“to the extent practicable”—should maintain six feet of distance from others “at all times, including in offices, conference rooms and all other communal and work spaces.” This requirement would apply to, for example, covered contractor employees who have an approved accommodation to the vaccination mandate.

10. CONTINUED MONITORING REQUIRED

The White House, the Task Force and individual contracting agencies will continue to hold industry briefings and updates in the coming weeks to encourage maximum vaccination for employees. The courts may permanently enjoin the mandate, in whole or in part, or may allow enforcement to proceed. The ultimate fate of the requirement remains a question. However, compliance with the Guidance and FAQs could soon become contractually required for many contractors and subcontractors. Potential consequences for non-

compliance include contract termination, negative performance evaluations, suspension and debarment, and civil liability or criminal prosecution under the False Statements Act or False Claims Act. If the injunctions on enforcement are lifted, it remains unclear how the federal government will in fact enforce the mandate. This is perhaps the most significant issue for the government contracts industry and its supply chain that will be discussed and debated in the future.

ACTIONS TO TAKE

Covered contractors should immediately take the following actions:

- Designate a person(s) to coordinate COVID-19 workplace safety and monitor compliance with the mandate and implementing clauses.
- Monitor the Task Force Guidance, FAQs (which are being updated), and solicitation and contract clauses in all contract instruments as these are rapidly developing.
- Evaluate your worksites to determine which sites and employees are covered by the mandate.
- Ensure that adequate policies and procedures are in place to mitigate risks associated with non-compliance with the contract clauses.
- Establish a mechanism to document compliance with mandate.
- Establish a mechanism to securely collect vaccination information and documentation from employees.
- Establish a communications plan to inform employees of developments in Task Force Guidance or with respect to the mandatory vaccine requirement.
- Establish policies and determine consequences for employees refusing vaccination if injunctions on enforcement of the mandatory vaccine mandate are lifted; however, refrain from adverse employment actions with regard to vaccine hesitant individuals in jurisdictions prohibiting such actions pending outcome of litigation.
- Monitor all jurisdictions (federal, state and local) and status of legal challenges to determine the scope and validity of requirements and contractual actions.