

LEGAL BULLETIN

Legal Bulletin #911

September 27, 2021



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Vaccine guidance for federal contractors: The details

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As we **reported on Friday**, the **Safer Federal Workforce Task Force** complied with **Executive Order 14042** (“Ensuring Adequate COVID Safety Protocols for Federal Contractors”) by issuing **guidance** for federal contractors on mandatory vaccines for COVID-19. (For a review of the Executive Order, see our **prior Affirmative Action Alert**).

This bulletin does a deeper dive on the new guidance. After the Occupational Safety and Health Administration releases its **Emergency Temporary Standard for employers with 100 or more employees**, we will schedule a webinar that will address both topics. Look for our eblast on this webinar.

The guidance requires the following:

1. Full vaccination of all covered contractor employees.
2. Masking and physical distancing by covered contractor employees and visitors.
3. Designation of a COVID-19 Safety Coordinator.

COVERAGE

What contractors are covered by the Executive Order and guidance?

The Executive identifies four types of contracts that are subject to these requirements:

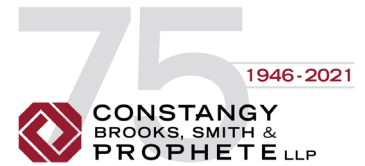
- Procurement contracts or contract-like instruments for services, construction, or a leasehold interest in real property.
- Contracts or contract-like instruments for services covered by the Service Contract Act.
- Contracts or contract-like instruments for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b).
- Contracts or contract-like instruments entered into with



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the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

The Executive Order expressly excludes grants, contracts below the Simplified Acquisition Threshold, and contracts for supplies.

If an organization does not have any of the contracts identified above, does that mean it will not have to comply with these requirements and can stop reading now?

Alas, no! The guidance “strongly encourages” federal agencies to include a clause requiring compliance with the vaccine mandate in *any contract*, including those not expressly encompassed by the Executive Order.

When will a covered contractor have to comply?

The short answer is whenever it has a covered contract. Although the Executive Order provides that the new contract clause must be included in covered contracts entered into on or after October 15, both the Order and the guidance encourage federal agencies to incorporate the contract clause wherever possible before that date. Thus, the effective date will vary depending on the date of the specific contract. Contractors generally are required to comply only with contract terms, so unless and until a contractor has a contract with the operative language, the guidance does not apply.

Do these requirements apply to subcontractors?

Yes. Subcontractors with covered contracts must also comply. Similar to most federal contracting provisions, contractors and subcontractors must “flow down” the contract clause to lower tier contractors.

VACCINATION

Which employees must be fully vaccinated?

The vaccination requirement applies to all “covered contractor employees.”

What is a “covered contractor employee”?

“Covered contractor employee” is defined as any full-time or part-time employee of a covered contractor that is either

- Working on or in connection with a covered contract, or
- Working at a “covered contractor workplace,” which includes employees who are not themselves working on or in connection with a covered contract.

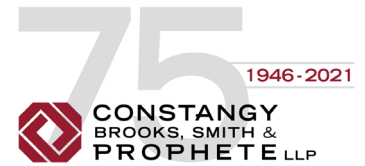
What is a “covered contractor workplace”?

“Covered contractor workplace” is defined as “a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present

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during the period of performance for a covered contract,” but it does not include an employee’s residence.

How is “working on or in connection with a covered contract” defined?

Employees who perform the specific work demanded by the covered contract are “working on” the contract. Employees who are not working on the contract, but are performing “duties necessary to the performance of the covered contract,” are considered to be “working in connection” with the contract. Examples of “working in connection a covered contract” provided by the guidance include human resources, billing, and legal review.

Do employees who work on the contract from their homes have to be vaccinated?

Yes. Even employees who work on or in connection with the covered contract from their homes must be vaccinated. However, a personal residence is not considered a “covered contractor workplace,” so masking and physical distancing requirements (as explained below) do not apply to remote workers.

What’s the deadline for contractor employees to be fully vaccinated?

This will depend on when the contractor has a covered contract. If a contractor has a covered contract on or before the October 15 effective date of the contract clause, covered contractor employees must be fully vaccinated by December 8. “After that date, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract.”

Should contractors exempt employees from the vaccination requirement if they have a medical reason or religious objection?

Yes. Employees who cannot be vaccinated because of a disability or because of a sincerely held religious belief, practice, or observance should be reasonably accommodated consistent with the **guidance from the Equal Employment Opportunity Commission**.

Are individuals who had a prior COVID-19 infection exempt from the vaccination requirement?

No.

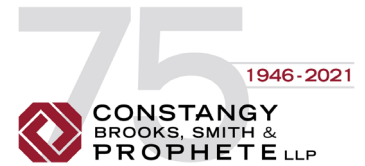
Are there any exceptions to the vaccine mandate for contractors?

The guidance allows for federal agency heads to approve exceptions in cases of “urgent, mission-critical need for a covered contractor to have covered contractor employees begin work on a covered contract or at a covered workplace before becoming fully vaccinated. . . .” However, in such cases, the contractor must ensure that covered contractor employees are fully vaccinated within 60 days and that, in the interim, unvaccinated employees comply with masking and physical distancing requirements.

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How do contractors ensure that covered contractor employees are fully vaccinated?

Contractors must require employees to provide proof of their vaccination status by providing one of the following:

- Record of immunization from a health care provider or pharmacy.
- COVID-19 Vaccination Record Card (CDC Form MLS-319813_r, published on September 3, 2020).
- Medical records documenting the vaccination.
- Immunization records from a public health or state immunization information system.
- Any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of the health care professional or clinic site administering the vaccine.

Are covered contractor employees required to provide original documents showing vaccination status?

No. Contractors may accept digital copies, such as pictures or scanned images of the vaccination documentation.

Does the vaccination requirement apply to non-employees who perform work at a contractor's workplace?

No, but the guidance "strongly encourages" contractors "to incorporate similar vaccination requirements into their non-covered contracts and agreements with non-covered contractors whose employees perform work at covered contractor workplaces but who do not work on or in connection with a Federal contract, such as those contracts and agreements related to the provision of food services, onsite security, or groundskeeping services at covered contractor workplaces."

MASKING & PHYSICAL DISTANCING

Who is required to wear a mask?

It depends on the individual's vaccination status and the level of community transmission in the area of the covered contractor workplace location.

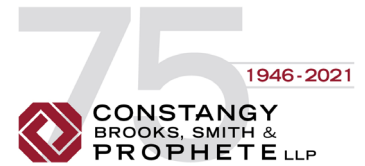
Fully vaccinated individuals

- Must wear masks in areas of **high or substantial community transmission**, except for when alone in an office or when eating and drinking while physically distanced.
- Do not need to wear masks in areas of **low or moderate community transmission**.

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Individuals who are not fully vaccinated must wear masks – regardless of the level of community transmission – when they are

- Indoors.
- Outdoors in sustained close contact with others who are not fully vaccinated.

As noted above, employees do not have to wear masks (or engage in social distancing) when teleworking, but they do have to be vaccinated.

How can a contractor determine the level of community transmission in its location?

The Centers for Disease Control and Prevention provides information on the level of community transmission at the **COVID-19 Data Tracker County View**, and contractors must check this site at least weekly and practice the appropriate safety measures based on this data. Before transitioning to measures appropriate for low or moderate transmission levels, the transmission level must remain at the lower threshold for at least two consecutive weeks.

Should contractors exempt employees from the masking requirement if they have a medical reason or religious objection?

Yes. Employees who cannot wear a mask because of a disability or because of a sincerely held religious belief, practice, or observance should be reasonably accommodated consistent with the **guidance from the Equal Employment Opportunity Commission**.

Are there any other exceptions to the masking requirement?

Yes. Contractors may provide exceptions for

- Employees engaging in activities in which a mask may get wet.
- High intensity activities where employees are unable to wear a mask because of difficulty breathing.
- Activities where wearing a mask would create a risk to workplace health, safety, or job duty as determined by a “**workplace risk assessment**.”

However, any exception must be approved in writing by a “duly authorized representative of the covered contractor.” Although not specifically stated by the guidance, it appears that this authorization should be performed by the COVID-19 Safety Coordinator (discussed below).

What types of masks are acceptable?

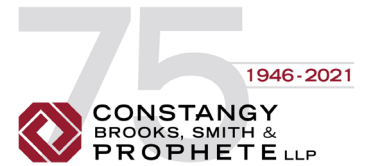
When masks are necessary, they must comply with the **CDC’s recommendations**, which may change periodically. The guidance lists the following types of acceptable masks:

- Disposable masks.

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- Masks that fit properly (snugly around the nose and chin with no large gaps around the sides of the face).
- Masks made with breathable fabric (such as cotton).
- Masks made with tightly woven fabric that does not let light pass through when held up to a light.
- Masks with more than one layer.
- Masks with inner filter pockets, and filtering facepiece respirators that are approved by the National Institute for Occupational Safety and Health or consistent with international standards.

Masks are not acceptable if they have valves, vents or openings, have only a single layer of fabric, or do not block light. Face shields without masks are also insufficient.

What must contractors do when employees are in circumstances requiring masks?

Contractors must ensure that individuals wear masks consistently and that masks cover employees' mouths and noses. Contractors must also ensure that masks are worn in common areas and shared workspaces, such as conference rooms.

Who is required to physically distance?

Fully vaccinated individuals do not need to physically distance regardless of the level of transmission in the area -- except when in areas of high or substantial community transmission, *and* if not masked while eating and drinking.

Individuals who are not fully vaccinated should, "to the extent practicable," stay at least six feet from other workers at all times.

As already noted, employees are not required to physically distance while teleworking, but they do have to be vaccinated.

COVID-19 SAFETY COORDINATOR

What does a COVID-19 Safety Coordinator do?

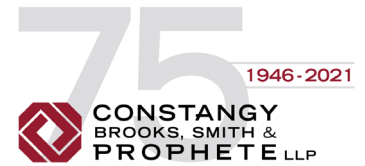
The COVID-19 Safety Coordinator must

- Coordinate implementation of and compliance with the guidance and workplace safety protocols at covered contractor workplaces.
- Ensure that information on required COVID-19 workplace safety protocols is provided to covered contractor employees and all other individuals likely to be present at covered contractor workplaces by

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- communicating the required workplace safety protocols and related policies by email, websites, memoranda, flyers, or other means,
 - posting signage at covered contractor workplaces that explain the requirements and workplace safety protocols in a readily understandable manner, and
 - communicating the COVID-19 workplace safety protocols and requirements related to masking and physical distancing to visitors and all other individuals present at covered contractor workplaces.
- Ensure that covered contractor employees provide proper vaccination documentation.

Who can be a COVID-19 Safety Coordinator?

Contractors may designate one or more persons to be COVID-19 Safety Coordinators, and the designees “may be the same individual(s) responsible for implementing any additional COVID-19 workplace safety protocols required by local, State, or Federal law, and their responsibilities to coordinate COVID-19 workplace safety protocols may comprise some or all of their regular duties.”

GENERAL

Are contractors required to post a notice for employees or visitors?

As outlined above, the COVID-19 Safety Coordinator is responsible for posting notices explaining workplace safety requirements for employees. In addition, contractors “should” post notices at entrances regarding appropriate safety protocols. “Covered contractors may take other reasonable steps, such as by communicating workplace safety protocols to visitors prior to their arrival at a covered contractor workplace or requiring all visitors to follow masking and physical distancing protocols for not fully vaccinated individuals.”

What if covered contractor employees also work at a government facility?

Employees that work on site at a government facility must also comply with all safety protocols implemented by that agency.

What if a contractor has employees in a state or locality that has laws or ordinances that conflict with the guidance?

According to the guidance, “These requirements are promulgated pursuant to Federal law and supersede any contrary State or local law or ordinance. Additionally, nothing in this Guidance shall excuse noncompliance with any applicable State law or municipal ordinance establishing more protective workplace safety protocols than those established under this Guidance.”

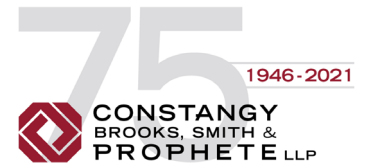
Will there be any changes to the guidance?

It’s possible. The guidance may be updated based on changes to CDC guidelines and “as warranted by the

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circumstances of the pandemic and public health conditions.”

What should contractors do next?

Watch for Constangy’s eblast announcing our in-depth webinar on the vaccine mandates, review the guidance in detail, and implement appropriate measures.

Contractors should also keep a careful eye on all future contracts and agreements that involve federal work. The Federal Acquisition Regulation Council will amend the FAR to add a contract clause that requires compliance with this guidance, so contractors should note the language that will be used in contracts. Although we do not yet know precisely what language will be used in the contract clause, the guidance says that the clause “shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force. . . .”

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For general information about COVID vaccination in the workplace, visit our **COVID Vaccine Resource Center** page.

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