SheppardMullin

EXECUTIVE ORDER 14042 SURVIVAL GUIDE

(An Analysis of What We Know, What We Think, and What We Don't Know about President Biden's COVID-19 Executive Order for Federal Contractors)

On September 9, 2021, President Biden signed an Executive Order (EO) to implement COVID safety protocols for Federal service contractors and subcontractors. While the EO did not outline specific rules, it did direct a Federal task force (the "Safer Federal Workforce Task Force," created by Executive Order in January 2021) to issue COVID-19-related workplace safety guidance for prime contractors and subcontractors.

On September 24, 2021, the Task Force issued that Guidance, setting out specific workplace safety protocols and providing a few Questions and Answers to aid in interpretation of those protocols. ***Most notably, the Guidance mandates that a wide swath of the federal contracting and subcontracting communities receive COVID vaccinations***.

The EO and Guidance are broadly worded; and, while they do NOT apply to all contractors, they will impose new compliance obligations upon many, including:

- Businesses that sell to the Government,
- Businesses that sell to businesses that sell to the Government,
- Colleges and universities,
- Hospitals and healthcare facilities,
- Hotels,
- Financial institutions, including participants in GSA's SmartPay program,
- Concessionaires, and
- Almost any other entity that receives Federal, non-grant dollars.

At the same time President Biden announced the EO, he also announced that the Occupational Safety and Health Administration (OSHA) will be developing an emergency standard that will require employers with more than 100 employees to mandate that employees be vaccinated or submit to weekly testing. While much remains unknown about the OSHA rule, we do know it does *not* preempt the EO.

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This *EO Survival Guide* answers many of the questions we have received regarding the EO and the Task Force Guidance. It also incorporates insights from the more recently issued FAR Clause, GSA Deviation, and DOD Deviation, all of which came out September 30, 2021. For ease of use, here are quick links to the FAQs this Guide covers:

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Obviously, this is a “live event,” and, even with the issuance of the GSA and DOD Deviations, much still is not known about how the EO and Guidance will be implemented. The Sheppard Mullin GovCon Team will continue to monitor the roll out of the new rule closely, and update this Survival Guide as necessary over the coming weeks. To the extent you have additional questions you would like answered in the next iteration of this Guide, just let us know.

Does The EO And Guidance Apply To Me?

It's likely. As discussed in more detail below, the new rules apply very broadly. If you sell a service to the U.S. Government or to a business that sells to the U.S. Government, you likely will be impacted by the rule in some way. Additionally, because the rule "urges" federal contracting officers to incorporate the new clause in contracts that go beyond the express scope of the rule, even product manufacturers are likely to be impacted in some way.

What Does The Rule Require?

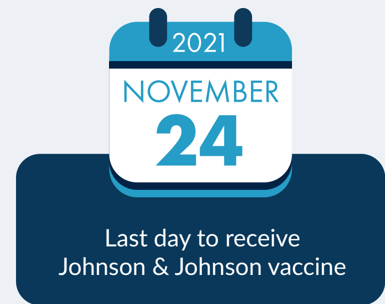
Broadly speaking, the Task Force Guidance requires vaccinations (with certain limited exceptions), proper masking, and physical distancing. The specifics are spelled out in the Task Force Guidance and will not be repeated here.

One point is worth emphasizing, though – all Covered Contractor Employees must be fully vaccinated by **December 8, 2021** (unless entitled to a legal accommodation), *including covered contractor employees working from home*. If you do the math, this means contractors that will be covered by the rule better get started NOW because employees are only considered "fully vaccinated" once they are two-weeks past the second dose of a two-shot vaccine, or two weeks after receiving a one-shot vaccine. What this means is that **October 27, 2021** is the last day a Covered Contractor Employee can receive the first shot of a Moderna two-shot vaccine in order to be in compliance with the new rules considering the four-week waiting period between shots, **November 3, 2021** is the last day to receive the first shot of a Pfizer-BioNTech two-shot vaccine considering the three-week waiting period between shots, and **November 24, 2021** is the last day to receive the Johnson & Johnson single shot vaccine.

After December 8, all Covered Contractor Employees must be fully vaccinated by the first day the clause is incorporated into your contract(s) (*e.g.*, the period of performance for a new contract, the first day of the period of performance on an exercised option or extended/renewed contract when the clause has been incorporated into the covered contract, or the first day the Government issues a modification to your contract incorporating the clause).

The Guidance also requires Covered Contractors to follow the CDC's guidelines for masking and physical distancing at a Covered Contractor Workplace (including indoor and outdoor facilities), which applies to employees and visitors. The applicable guidelines depend on whether the Covered Contractor Workplace is located in an area of high or substantial community transmission. These guidelines also vary (*i.e.*, are less stringent) depending on whether an individual is fully vaccinated.

Vaccination Countdown to December 8th Compliance



* Timelines for international vaccines may vary

Are There Exceptions To The Vaccination Requirement?

There are two types of exceptions to the vaccination requirement — employees who need to be accommodated due to their sincerely held religious belief and/or a disability/medical condition. The Guidance also includes an exception for an urgent or mission-critical need for a Covered Contractor to have Covered Contractor Employees begin work on a Covered Contract or in a Covered workplace prior to being fully vaccinated (but such employee must get fully vaccinated within 60 days thereafter). Keep in mind, these exceptions are different from "opting out." The Guidance does NOT permit individuals to opt-out of the vaccination requirements by subjecting themselves to regular testing (as will be permitted under the OSHA regulation). Further, the Guidance does not allow employees to demonstrate natural immunity via proof of prior COVID infection or positive results from an antibody test. The only actual exceptions are religious and medical exceptions.

Frustratingly, the Guidance fails to provide the necessary details in two key areas.

First, the Guidance does not provide any direction to Covered Contractors to assist with the evaluation of religious/medical exception requests, although Title VII and the Americans with Disabilities Act have guidance as to what can be considered by an employer. Covered Contractors will be required to evaluate these requests pursuant to the existing rules. This reality increases the likelihood of law suits against contractors: reject a request and risk being sued by the employee; grant a request and risk being sued by all *other* employees who work near the exempted individual. We have urged GSA to work toward providing at least some limited immunity to companies that make a good faith exemption decision, in the way the Government provides limited immunity under the Defense Production Act, the PREP Act, and the SAFETY Act, but we are not optimistic our advice will be adopted any time soon.

Second, the Guidance fails to provide the parameters to assist Covered Contractors in understanding what types of accommodations can be made available to employees granted an accommodation due to a sincerely held religious belief and/or a disability/medical condition. For example, will the EO allow for an employee that meets the criteria for a religious accommodation to be in the workplace if they are masked at all times while distancing from others? Or, will the EO require that employee to work remotely? What if the position cannot be remote? These questions remain unanswered and we have urged GSA to provide guidance.

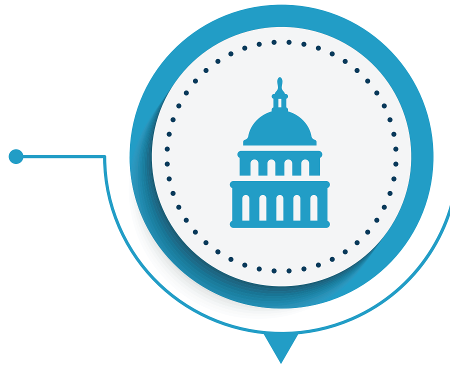
What Is A Reasonable Accommodation For An Employee With A Sincerely Held Religious Belief?

If an employee seeks an accommodation due to a sincerely held religious belief, Title VII requires an employer to engage in an interactive process to determine what reasonable accommodation may be available. In some cases, it may be that an employee can telework if they do not need to be on-site with a customer. In some cases, if an employee's position requires them to be on-site with a Federal Agency, the accommodation may be an unpaid leave of absence. The most important reminder is that there is not a "one size fits all" formula for determining a reasonable accommodation, and such decisions must be made on an individual basis.

To What Contracts Does The Rule Apply?

The EO applies to contracts *and contract-like instruments*, which, according to the Department of Labor, means any "agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." The DOL definition (which is expressly incorporated into the EO) includes, but is not limited to, any "mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them." This would cover directly awarded competitive contracts, sole source/limited source contracts, Government-wide acquisition contracts, other multiple award contracts (including the GSA and VA Schedules), and task orders issued under multiple award contracts.

Executive Order Coverage



Do I sell to the Government or to a prime contractor?

- Most contracts/agreements are covered.
- Task orders and BPAs are covered.
- Procurement and non-procurement agreements are covered.
- Grants are not covered.

Will I have these clauses in my contract?

- FAR/DFARS clauses and agency deviations released on September 30.
- Agencies (and prime contractors) have started incorporating the new clauses into agreements.
- Agencies are encouraged to insert these clauses BEFORE renewals and extensions.
- Agencies are encouraged to include these clauses in ALL contracts, regardless of EO direction.

Do I sell a covered service?

- All services provided by a human being are covered.
- As of October 2021, it is unclear whether non-labor services (*e.g.*, data storage) will be covered.
- GSA is applying the clause to ALL contracts, even products contracts, because they necessarily involve some human services.

Are my employees covered by the rule?

- Those working on a federal contract are covered.
- Those working in connection with a federal contract are covered.
- Those working in a facility where any covered employee works are covered.
- See our *Covered Employee Decision Tree* for more information.

The new clause will find its way into all "new contracts" including renewals, extensions, and option exercises. By its terms, however, the clause should not be included in contracts or subcontracts below the Simplified Acquisition Threshold (SAT), currently set at $250,000. Nor should the clause (yet) apply to grants.

In short, even with the SAT exception, contractors and subcontractors should think of the scope of the EO as very broad. The proposed definition includes almost all contracts and subcontracts at any tier thereunder, whether negotiated or advertised, including procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing.

The more recent Guidance reaffirms the breadth of the "contracts and contract-like instruments" to which the requirements will apply. In particular, it reminds us that "[t]he term contract shall be interpreted broadly as to include, but not be limited to, any contract within the definition provided in the FAR at 48 CFR chapter 1 or applicable Federal statutes. This definition includes, but is not limited to, any contract that may be covered under any Federal procurement statute."

Does The Rule Cover Indirect Employees?

The new clause covers anyone "working on or *in connection with*" a Federal contract or subcontract. The "in connection with" language is interesting. It is meant to cover employees beyond direct billers. While the EO does not define the term, a recent DOL regulation using the same language is instructive. DOL considers a worker performing "in connection with" a covered contract to be "any worker who is performing work activities that are necessary to the performance of a covered contract but who is not directly engaged in performing the specific services called for by the contract itself." 86 Fed. Reg. 38,830 (July 22, 2021). For example, according to DOL, a payroll clerk who processes the paychecks of a direct bill employee – though not performing directly on the contract – is performing "in connection with" the contract.

The Guidance gives three examples of indirect personnel who typically work "in connection with" a covered contract: Human Resources, Billing, and Legal. Reasoning from these examples, we suspect the following corporate groups very well may fall within the scope of the rule as well:

- Accounting
- Sales Support
- Information Technology
- Finance
- Contracts

And remember – even if only a fraction of these employees' time is performed in connection with a Federal award, they still are subject to the mandate.

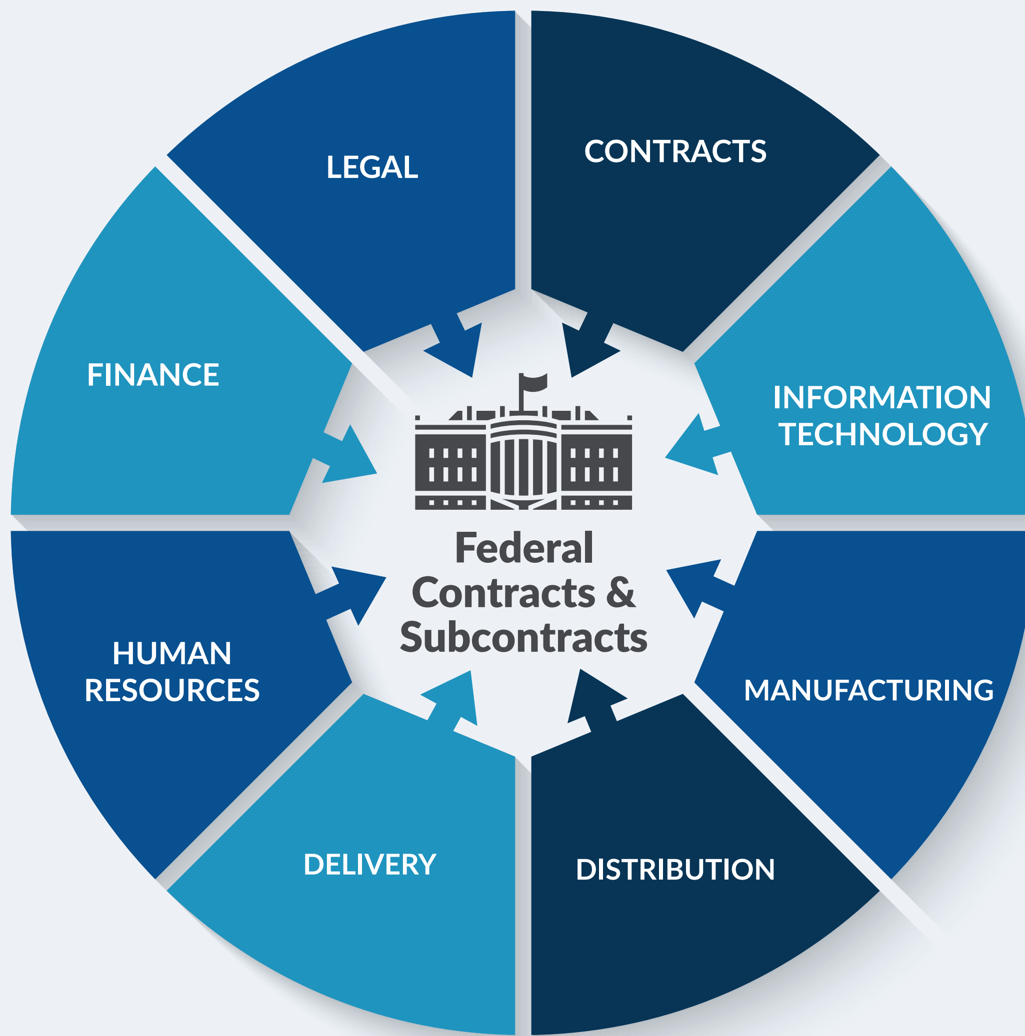
In contrast, according to DOL, a janitor who is hired to clean the bathrooms of the contractor's building or a landscaper who is hired to cut the lawn outside the building, is not performing work necessary to the performance of the contract, and therefore, is not performing work "in connection with" such contract. Extrapolating again, it's possible the following non-employee individuals would *not* be covered by the rule:

- Janitor
- Landscaper
- Plant Caretaker
- Vending Machine Technicians

But remember, the Guidance recommends contractors apply the rule even to these groups at its discretion.

This obviously is a very broad interpretation of "in connection with." This is a much broader formulation than we typically use when we consider who is supporting a Federal contract, and obviously significantly increases the reach of the internal controls/compliance program that will need to be developed to ensure compliance.

Examples of personnel likely working in connection with a federal contract



What Products/Services Are Covered?

As a starting point, *the EO covers only services; it does not cover products*. However, the EO encourages agencies to expand its reach to cover products contracts too, and, in fact, agencies appear to be accepting that encouragement. For example, on September 30, 2021, GSA issued its new clause, which will be inserted into all services AND product contracts, at least with respect to GSA Schedules. (According to GSA, it's too hard to figure out which contacts are for products versus services, so the Agency simply applied it to both.)

With regarding to services, the question most contractors are struggling with, even with the publication of the GSA and DOD Deviations, is figuring out to what services the rule applies.

Here is specifically what the EO says the new clause will cover:

1. Contracts and contract-like instruments (CLI) for services, construction, or a leasehold interest in real property;
2. Contract/CLI covered by the Service Contract Act;
3. Contract/CLI for concessions, including any concessions contract excluded by DOL regulations; or
4. Contract/CLI entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

Item 2 on the list is notable – and confusing. Since Item 1 seems to cover "services," and "SCA services" obviously are "services," Item 2 would seem to be superfluous. Nonetheless, based on our reading of the GSA and DOD Deviations, it seems clear the Government intends the new rules to cover (at least) all services performed by a human being. (See below for a discussion regarding services not performed by a human being, *e.g.*, data storage, internet, SaaS, etc.)

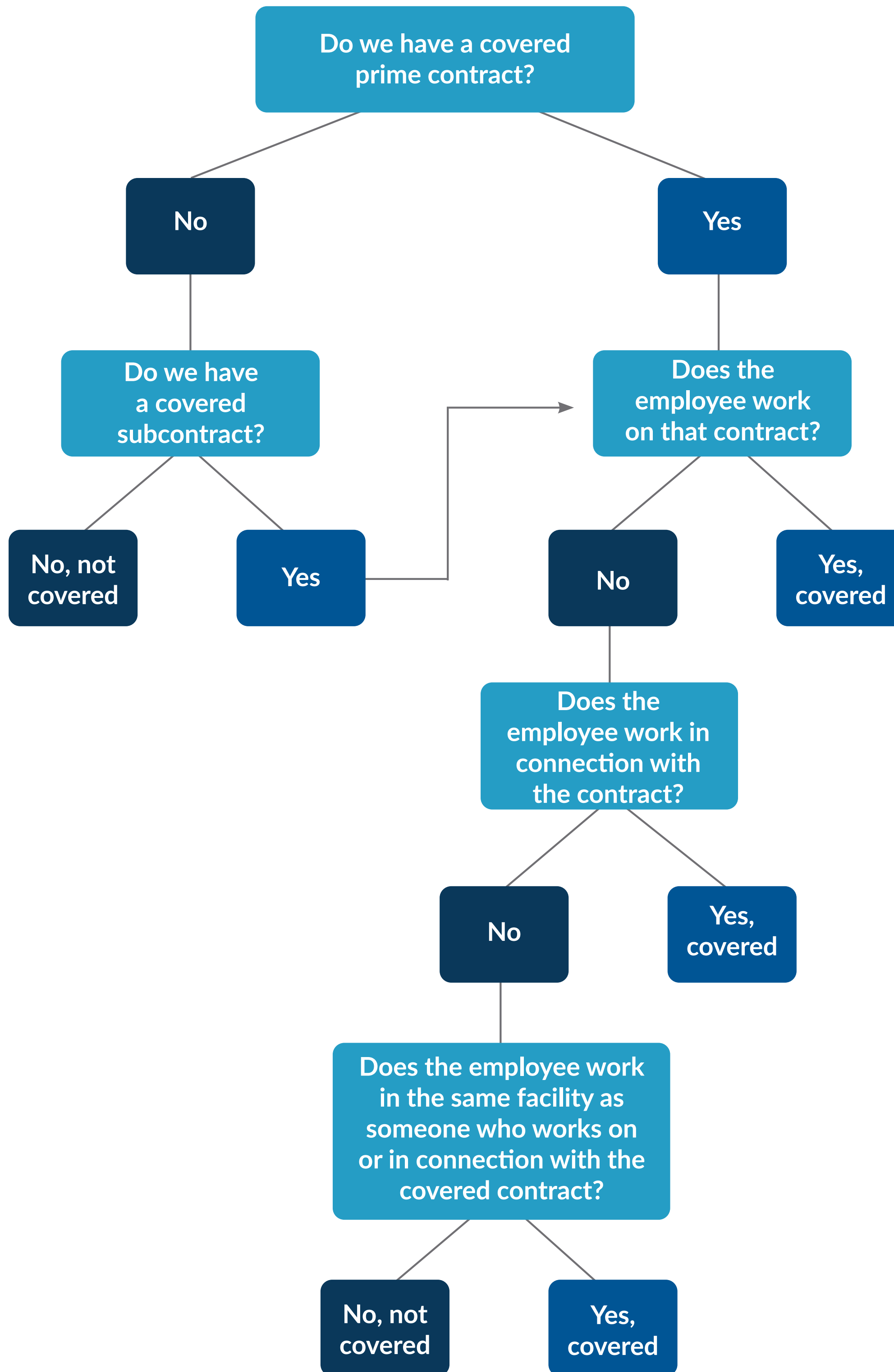
It's also useful to note what the EO expressly does *not* cover. The EO does not apply to:

1. Grants;
2. Contracts/CLIs with Indian Tribes;
3. Contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold;
4. Employees who perform work outside the United States or its outlying areas; or
5. Subcontracts solely for the provision of products.

The inclusion of Item 5 on the list (regarding product subcontracts) is a good reminder that the new clause (1) is intended to flow down to subcontractors and (2) is intended to apply to *mixed* products/service subcontracts.

Notably, the two foregoing lists do not provide insight into if/how the new clause will apply to technology companies providing software-as-a-service, platform-as-a-service, and other license-based cloud offerings to the Federal Government, and, unfortunately, the September 30 GSA and DOD deviations do not fully solve the riddle. The question could come down to whether the contractor identifies its offerings as products or services. For example, companies offering software-as-a-service may find themselves pulled into compliance with the forthcoming rule, while companies offering software as a product may avoid the rule's application.

Employee Coverage Decision Tree



A similar question arises with regard to contractors offering non-labor services, such as web hosting, telecommunications services, satellite bandwidth, and the like. If these services are sold as a service, then presumably the new clause will cover the personnel supporting those services. On the other hand, where those services are sold as a product, the new clause may not apply. But this very much is an open question.

One group, however, has received an answer to this question: GSA Schedule contractors. As noted above, GSA has accepted the President's encouragement and is applying the new clause to ALL Schedule contracts. And we have no reason to believe other agencies will not do the same. So no one should get too excited about falling within one of the exclusions above as that excitement could come to a crashing halt if your agency customer submits to this official "encouragement."

Are Banks And Financial Institutions Covered Contractors?

In a word, sometimes. A financial institution, including a bank, that holds a federal government contract or lease likely will be considered a Covered Contractor for purposes of EO 14042. As would banks and credit unions with branches on military bases or in federal office buildings. The more interesting question, we think, is whether a financial institution would be deemed a Covered Contractor merely by virtue of its contractual relationship with the FDIC to insure deposits. Unfortunately, the answer to that question is not clear.

As an initial matter, the FDIC does consider insured banks to be "federal contractors" in some contexts, for instance, with respect to federal equal opportunity employment rules. But the implementing regulations for the Executive Order that established those rules (Executive Order 11246) expressly reference businesses that serve as a depository of federal funds. In contrast, EO 14042 includes no such language. By its terms, EO 14042 applies to "[e]xecutive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act . . . ." The FDIC is not an executive department or agency, and may not be an "independent establishment." (GAO, for example, will not hear bid protests involving FDIC awards.)

Further, it's worth noting that at least one organization with deep knowledge of the banking industry, the American Banking Association (ABA), is taking the position that banks are not Covered Contractors merely by virtue of accepting FDIC insurance. The ABA credibly (in our view) reasons from the federal minimum wage order covering federal contractors. As far as we can tell, the FDIC itself has not opined on the matter yet.

In the end, it's important to keep in mind that the issue here is not settled – with one exception. Banks and other financial institutions *with actual contracts and contract-like agreements* with the federal government (*i.e.*, something beyond mere FDIC insurance) likely will come within the scope of the new rules. Of course, all this analysis could end up being irrelevant if the FDIC *voluntarily* imposes the mandate on all insured banks.

Can I Just Stop Selling Services?

Sure. But if your goal is to avoid the reach of the new clause, it may not help. First, as noted above, GSA has decided to apply the new clause to services and product contacts. Thus, if you hold a GSA Schedule contract, you are going to be covered whether you sell services or not. Second, we have good reason to believe other agencies will do the same. Remember, the Government is "urged" to apply the rule even to contractors that do not provide services. Third, the new clause flows down to ALL subcontract tiers until you get to a tier that provides exclusively products. As many product suppliers offer services in connection with the products (*e.g.*, maintenance, installation, training, etc.), higher tier contractors likely will be flowing down the clause in any event.

What If I Want To Get Out Of The Federal Contracting Business Altogether?

We've heard a few companies contemplate – some facetiously, some seriously – that they will need to withdraw from federal contracting because the cost and risk of compliance with the new rules will be so high, including the very real possibility of having to terminate a multitude of non-compliant employees. (In contrast, we have heard many companies expressing thanks that the new rule now removes the company from having to be the heavy when it comes to COVID-safety decisions and mandates.) If you are considering leaving federal contracting, however, consider this: You are likely to be covered by the rule anyway.

- First, the OSHA rule reaches any company with more than 100 employees and applies some of the same rules as the Executive Order (*i.e.*, at the very least, your employees still will be required either to be vaccinated to provide negative tests weekly).

- Second, the clause is a *mandatory* flowdown. Thus, if you aren't subject to the federal clause, you very well may be subject to the flowdown clause by way of the prime contractor.

- Third, even when *not* a mandatory flowdown, prime contractors likely will take a conservative approach and include the new rule in ALL of their subcontracts and vendor agreements. Otherwise, prime contractors will be assuming the risk of subcontractor/vendor noncompliance, and have little incentive to do so.

In short, if you don't think through it carefully, you could end up spending a lot of time, energy, and money and find yourself right back where you started.

This Is Going To Be Expensive. Can I Recover My Costs?

It depends on the types of contracts you hold. Contractors performing on cost-reimbursement contracts may be able to cover the costs of complying with the new rule if such costs are allowable under the company's disclosed accounting practices. Recovery will not be so easy for commercial items contractors. Commercial items contractors – *e.g.*, GSA Schedule contractors – will have to convince their contracting officers that a price increase is necessary. GSA's standard Economic Price Adjustment Clause includes a provision to deal with "unforeseeable major changes in market conditions." Per GSA Clause I-FSS-969, when unforeseeable major changes do occur, "the contracting officer will review requests to make adjustments, subject to the Government's examination of industry-wide market conditions and the conditions. . . ." The clause, however, makes clear that "the determination of whether or not extra-ordinary circumstances exist rests with the contracting officer."

For other contracts, some of the best tools available are the Changes clauses in your contracts. The FAR includes a number of Changes clauses, such as FAR 52.243-1, -2, and -3, as well as 52.212-4(c). Under FAR 52.243-1, for example, the CO is permitted to make changes to the delivery location, the specifications for products being acquired, the shipment or packing method, the "description of services to be performed," and the time and place of performance of the services. Key to recovery of costs and obtaining schedule relief under these provisions, however, is notice to the Government of the cost and schedule impacts of the changes.

According to OMB COVID-related guidance issued toward the beginning of the pandemic, COs should consider requests for equitable adjustment "on a case-by-case basis in accordance with existing agency practices, taking into account, among other factors, whether the requested costs would be allowable and reasonable to protect the health and safety of contract employees as part of the performance of the contract." OMB went on to remind COs that "The standard for what is 'reasonable,' according to FAR § 31.201-3, is what a prudent person would do under the circumstances prevailing at the time the decision was made to incur the cost (*e.g.*, did the contractor take actions consistent with CDC guidance; did the contractor reach out to the contracting officer or the contracting officer representative to discuss appropriate actions)."

We provided a more robust discussion of cost recovery issues in our first COVID Survival Guide, which you can find HERE.

Do I Have To Terminate Employees Who Refuse To Get Vaccinated?

Quite possibly. While, in theory, you could find a job for an employee who refuses to be vaccinated and does not fit within an exemption that takes him/her out of the definition of a Covered Contractor Employee, this will not be an easy task for most companies because of the broad definition of a "Covered Contractor Workplace." The employee would have to (a) not work on a government contract, (b) not work in connection with a government contract, and (c) not work in a Covered Contractor Workplace. Since shared services departments at most companies (HR, Legal, Finance, etc.) will render many if not most facilities a "Covered Contractor Workplace," it's likely an individual would have to work from home in order to fall outside the reach of the rule. If this arrangement is not feasible, then you may have to put such employees on an unpaid leave of absence and/or terminate their employment. Just make sure you talk with your Labor & Employment lawyer first.

I Could Have To Terminate A Significant Number Of Employees. What If This Renders Me Unable To Perform My Contracts?

We've heard from many clients that the new rule will result in significant termination of personnel. One client estimates it will have to terminate 20-40% of its service technicians due to vaccination refusals. This is not a Chicken Little fear. According to the Harvard Kennedy School, as of June 2021, fully ½ of services sector employees still had not been vaccinated.[1] A Carnegie Mellon Study earlier in the year found that "vaccine hesitancy" ranged widely depending on occupation. For example, 42% of service employees working in the installation, maintenance, and repair sector responded they were hesitant to receive the vaccination, and over 46% of service employees in construction/extraction said the same thing.[2] (As a comparison, hesitancy among educators was less than 10% in the life, physical, and social sciences.) In short, there is good reason to believe substantial terminations in certain occupations will follow the implementation of the new clause. And those terminations could make it harder for some companies to meet their contractual obligations.

To prepare for this possibility, contractors quickly should become familiar with their contracts' excusable delay clauses. The FAR includes a number of different delay clauses, tailored to different contract types, including:

- FAR 52.249-14 – Excusable Delay
- FAR 52.212-4(f) – Excusable Delay (commercial items)
- FAR 52.249-8(c), -9(c), -10(b) – Default

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[1] https://shift.hks.harvard.edu/wp-content/uploads/2021/06/Vax_Brief_6.28.21-2.pdf.

[2] https://www.medrxiv.org/content/10.1101/2021.04.20.21255821v2.full.pdf.

Each clause is slightly different, but they all more or less serve the same purpose — excusing the contractor from a delay in performance caused by events beyond its control. FAR 52.249-14, for example, provides (in relevant part) as follows:

> (a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, ***(5) epidemics***, ***(6) quarantine restrictions***, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. Default includes failure to make progress in the work so as to endanger performance.

48 C.F.R. § 52.249-14 (emphasis added). To take advantage of the "excuse" these clauses provide, the contractor must be able to link the excuse to the delay. This effort will require the contractor has maintained meaningful documentation.

There is a lot more to talk about in this context. We provided a more robust discussion of cost recovery issues in our first COVID Survival Guide, which you can find HERE.

How Am I Supposed To Track Compliance?

The Task Force Guidance requires contractors to designate one or more person to coordinate the contractor's compliance efforts. Importantly, this person's role goes well beyond drafting a policy and ensuring all those little physical distancing stickers are strategically placed. This person actually must make meaningful efforts to ensure compliance by individuals – including vaccine documentation (*including visual proof*), social distancing, and *proper* mask wearing.

Does The Mandate Apply If I Do Not Work On A Government Site?

Yes. Perhaps the most prominent expansion of the EO is the new term "Covered Contractor Workplace." A Covered Contractor Workplace is "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*** during the period of performance for a Covered Contract." That's worth repeating: If an employee who is working on or supporting a covered contract is "likely" to enter a facility, the whole facility is covered by the rule and everyone who works in it must get vaccinated and follow all other applicable COVID safety rules.

Thus, it doesn't matter if you work on a contractor site or a Government site – or, in some cases, whether you work at home. The rule is intended to keep contractors and subcontractors healthy in order to "promote economy and efficiency" in the procurement process. Thus, the forthcoming clause will apply to ***any*** workplace location in which an individual is working on or in connection with a Federal Government contract or contract-like instrument. The clause covers both onsite and offsite employees. Notably, however, the clause will *not* cover employees performing work outside the U.S.

In short, the guidance covers three groups of employees:

(a) Employees working on a covered contract (broadly defined),

(b) Employees supporting (broadly defined) a covered contract, and

(c) Employees working in a location in which an employee covered by (a) or (b) is "likely" to visit.

There is a theoretical carve-out for facilities that can be fully separated from a Covered Employee (including common areas, lobbies, stairwells, elevators, and even parking lots), but that carve-out does not seem particularly practical for most companies.

The Guidance also clarifies that even if Covered Employees are working remotely – *including from their own homes* – they still are required to be fully vaccinated. (Although, you will be happy to know you do not have to wear a mask or maintain social distance from your loved ones as those rules explicitly do not reach into your homes).

Thus, it appears the only service contractor employees not within the reach of the Guidance are those working directly and exclusively for commercial customers (who do not flowdown the clause) and who do not visit any company facilities that Covered Employees visit. It's likely many contractors can count the members of this group on one hand. To understand why, consider this: if you're an in-house counsel or HR representative at a company with covered contracts and you are responsible for periodically visiting your company facilities nationwide, *all* employees at *all* of those facilities will be covered under this rule because you work "in connection with" covered contracts.

Does The Rule Flow Down To Subcontractors?

Yes. The EO makes clear the clause will flow down to subs *at every tier*, except "subcontracts solely for the provision of products." Accordingly, we should expect to see the new clause added to the list of "mandatory flowdowns" identified in FAR 52.212-5(e) and FAR 52.244-6. This means that, shortly, prime contractors will have to dust off their standard flowdown provisions, self-certifications, subcontracts, and vendor agreements to add a new provision.

Consistent with the EO, the Guidance clarifies the prime contractor must flow the clause down to first-tier subcontractors; higher-tier subcontractors must flow the clause down to the next lower-tier subcontractor, to the point at which subcontract requirements are solely for the provision of products.

Can I Just Put Up A Poster And Email My Employees To Notify Them To Follow The New Rules?

No. The Guidance places upon the contractor the obligation to "ensure compliance." To facilitate this internal policing, the Guidance requires contractors to appoint a COVID safety coordinator (who must be a Covered Employee), who will be responsible for providing updated information on the workplace protocols to employees and visitors, and ensuring compliance with such protocols.

With regard to vaccinations, the coordinator (or other contractor employee) will have to review the vaccine documentation of their covered employees. This means a Covered Contractor cannot simply rely upon an employee's self-certification – it must review some proof of vaccination. Acceptable documentation can be provided in hard copy or digital format (*e.g.*, a scanned PDF or photo or the original documentation), and certain copies are permissible.

Can I Stand Up A New Affiliate And Put All My Federal Contracting There?

Great question, but unfortunately the answer is not yet clear. The rule expressly covers "the contractor" and the contractor's "employees." This obviously is quite different from covering the contractor and its affiliates. This distinction is meaningful. When the Government issued its Section 889 rules, the FAR Council included commentary making clear the core rule applies only to the "entity that executes the contract." In other words, according to the FAR Council, when that rule talks about the "offeror" or the "entity" it does *not* include parents, subsidiaries, or other affiliates. This, of course, is the basic rule of corporate law – *i.e.*, different legal entities are different legal entities.

One would think the same rule should apply here. The EO is directed at "the parties that contract with the Federal Government." The Guidance reinforces this by emphasizing that a covered contractor "means a prime contractor or subcontractor at any tier who is party to a covered contract." Obviously, a separately incorporated affiliate is NOT a party to the contract. Further, the recently-issued FAR Clause likewise focuses on the "contractor" and the "subcontractor," not affiliated entities.

That all being said, contractors probably should not rush out to establish new affiliates just yet. First, if an affiliate is viewed as a subcontractor to the contractor, that affiliate will be covered by the new clause because it is a mandatory flowdown (and, given the expansive definition of "Contract" in the EO, the Government has sufficient grounds to argue any shared services agreement between a parent and subsidiary, whether written or oral, constitutes an agreement mandating inclusion of the new FAR clause). Second, there is good reason to believe the Government will not stand idly by and watch a proliferation of "affiliated" companies designed to circumvent the purpose of the Executive Order. The Government is well equipped to remedy this gap through contractual and/or regulatory drafting should it see the need.

How Will The Rule Be Implemented?

The EO will be implemented through a new FAR clause that will have to be incorporated into new solicitations and new contracts. (Remember, "new" contracts include options, renewals, extensions, etc.) Ahead of its October 8th deadline, the FAR Council issued guidance to all agencies that award contracts under the FAR. The core of the interim clause (FAR 52.223-99) provides as follows:

> (c) *Compliance*. The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at https:/www.saferfederalworkforce.gov/contractors/.

Agencies can use this ***approved FAR clause*** until the final FAR clause is approved (via FAR Case 2021-021). Also, it is interesting that the clause incorporates a link to the Task Force Guidance, which might make this the first truly "dynamic FAR clause" we've seen.

Both GSA and DOD issued their own Class Deviations, DOD with its own DFARS clause (252.223-7999).

What Are The Key Compliance Dates I Should Keep Track Of?

The EO already is in effect, although, at the moment, it has no immediate legal implication on contractors. The following dates are important from this point forward:

- **October 15, 2021**: all options exercised on or after this date must include the new requirements of the EO (to comply with the Guidance), and all new solicitations must include the new requirements.
- **December 8, 2021**: contractors must have confirmed that all Covered Contractor Employees are vaccinated under existing contracts with the clause already incorporated.
- **November 14, 2021**: all contracts awarded on or after this date must include the new requirements of the EO (to comply with the Guidance).
- **Post-December 8, 2021**: 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.

I Hold A GSA Schedule Contract. How Much Time Do I Have To Come Into Compliance?

As anticipated, GSA appears to be the first agency to issue a deviation for all GSA contracts. The GSA Deviation requires contractors to accept the new FAR clause almost immediately:

- The GSA Deviation requires contracting officers to include the new clause in new solicitations; existing solicitations; and new contracts, lease acquisitions, and "contract like instruments" issued on or after October 15, 2021.
- For existing Schedule contracts, we expect GSA to issue a Schedule Refresh to incorporate the new FAR clause in the very near future.
- GSA plans to implement the clause through a *bilateral modification*. However, "bilateral" apparently means something different to GSA than it does to us. According to GSA, if you hold a GSA Schedule (or other IDIQ contract) and you don't accept the "bilateral" mod by November 14th, GSA "may" "hide" your information on the GSA website and flag you as not having accepted the modification. Bilateral?! We're not so sure.
- Once the clause is in your Schedule, it will apply to the exercise of options on all existing orders AND to all future orders. It appears GSA will not attempt to force the FAR clause into existing task orders; however, the ordering entities themselves very well may do so (although, it would require an independent bilateral negotiation).
- GSA explicitly applies the FAR clause to all GSA Schedule contracts, which suggests GSA reads "services" to include human being services *and* other services (*e.g.*, data storage, internet, SaaS) – or at least does not want to have to figure it out.
- GSA has embraced the President's "encouragement" and will apply the FAR clause to GSA PRODUCT contracts as well as GSA services contracts. GSA contends it is not "administratively feasible" to "distinguish" product offerings from services offerings, and therefore applies the clause to both.

How Will The Government Enforce All This?

It is an open question when and how the Government will enforce these new rules. But, the President's stated goal to vaccinate as many people in the U.S. as quickly as possible makes us think we will see more active enforcement earlier in the regulatory life cycle than we do with most initiatives. Also, whereas plaintiff's lawyers often wait some time before filing suits (to avoid defenses that contractors have not had adequate time to comply yet), we're not so sure they will be as patient here in light of the clarity of the rule (in many respects) and the clear deadlines (again, in many respects).

I've Seen Multiple Orders Relating To COVID-19. What's The Difference?

If you're confused by the recent proliferation of federal orders relating to COVID safety, you're not alone. Here is a quick overview of the recent Executive Orders and the related compliance obligations they create for federal contractors:

- ***EO 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors (Sept. 9, 2021).*** This EO, which is the primary focus of this Survival Guide, creates the broadest set of compliance obligations for federal contractors. We won't rehash those obligations here, but most notably, EO 14042 requires that Covered Contractor employees be fully vaccinated by December 8th. The EO also requires Covered Contractors to implement COVID-19 safety protocols (masking and physical distancing) in their covered facilities. The EO does *not* allow for an "opt-out" option such as testing instead of full vaccination.
- ***EO 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees (Sept. 9, 2021).*** This EO, although issued on the same day as EO 14042, does not apply to federal contractors. It applies only to executive agencies and their employees.

- ***EO 13991, Protecting the Federal Workforce and Requiring Mask-Wearing (Jan. 20, 2021)***. This EO directs executive departments and agencies to require compliance with CDC guidelines (including masking and physical distancing) by (1) on-duty or on-site federal employees; (2) on-site federal contractors; and (3) all persons in federal buildings or on federal land. This EO also created the Safer Federal Workforce Task Force, the drafter of the Guidance described throughout this Survival Guide.
- ***Occupational Safety and Health Administration (OSHA) Emergency Temporary Standard (TBD).*** OSHA is developing an emergency standard that will require employers with more than 100 employees to mandate that employees be vaccinated or submit to weekly testing. If this is successfully implemented, it will apply to *all* employers with more than 100 employees, not just federal contractors and subcontractors. Notably, the more stringent EO 14042 rules preempt any OSHA rules for Covered federal contractors and subcontractors.

What Should We Do Now?

If you have determined that you're covered by the EO, we would encourage you to start the administrative process of determining *which employees* are covered and which have been vaccinated. The more notice – the better.

- Consider emailing employees to notify them of the new Federal requirements, that a corresponding policy will be coming, and to encourage them to provide their vaccination status prior to the deadline.
- Establish a method for collecting (and validating) vaccination information.
- Remind employees that their vaccination status will be kept confidential and that all medical information will be kept separate and apart from their personnel information.
- Encourage employees who will be seeking an exemption to notify Human Resources, promptly provide them with any required forms, and begin the interactive process – the earlier this begins, the better!
- Send reminders to employees as the deadline approaches and make plans for any actions you will take for those employees who refuse to be vaccinated.

We also recommend (1) identifying one or more COVID Safety Coordinators and (2) developing a written implementation plan ASAP. The plan should cover not only vaccinations, but the other elements of the Guidance as well as the documentation your company will need to support any delay claim you think could become likely.

There are many useful steps contractors can take now. To get you started, check out the *To-Do List* on the adjacent page.

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This Survival Guide is provided for information purposes only and does not constitute legal advice and is not intended to form an attorney client relationship. As you are aware, things are changing quickly. This Survival Guide does not reflect an unequivocal statement of the law, but instead represents our best interpretation of where things currently stand. This Survival Guide does not address the potential impacts of the numerous other local, state, and federal orders that have been issued in response to the Covid-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay, and other issues.

- [ ] Provide notice to employees of EO requirements (including vaccination mandate)
- [ ] Identify COVID Coordinator(s)
- [ ] Prepare written compliance plan
- [ ] Identify covered contracts and subcontracts
- [ ] Identify covered employees (direct, indirect, and workplace)
- [ ] Develop process to review and log vaccination cards
- [ ] Create medical/religious exemption request templates
- [ ] Develop process to evaluate medical/religious exemption requests
- [ ] Determine compliant accommodations for exemptions
- [ ] Execute on plan for non-compliant employees
- [ ] Prepare flowdown clause, transmit to subcontractors, and monitor responses
- [ ] Monitor flowdowns from prime contractors
- [ ] Prepare template prime/subcontractor notices
- [ ] Stay current on Task Force Guidance (FAR clause is dynamic) and CDC Guidelines
- [ ] Wear a mask, avoid large crowds, keep your distance, wash your hands, and get vaccinated

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EXECUTIVE ORDER 14042 SURVIVAL GUIDE

(An Analysis of What We Know, What We Think, and
What We Don't Know about President Biden's COVID-19
Executive Order for Federal Contractors)