

Government Contracts

Government Contractors Provided “Flexibility” Regarding Timing and Enforcement of COVID-19 Vaccine Mandate



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After this alert was published, on November 10, the Task Force updated the Guidance document to clarify that covered contractor employees must be “fully vaccinated” by January 18, i.e., two weeks after the January 4 deadline to receive the required shots.

The last two weeks have brought a flurry of activity and changes to the Safer Federal Workforce Task Force (Task Force) Guidance issued pursuant to President Biden’s Executive Order 14042 (EO). (See our prior alerts on the EO and Task Force Guidance [here](#) and [here](#).) As government contractors work to understand and implement these requirements, they have been left interpreting a number of White House press statements and updates to Q&As available on the Task Force website. Here is a brief summary of recent updates and key issues:

- **A New Deadline:** According to a White House [press briefing](#) and [Fact Sheet](#), the deadline for covered contractor employees to receive the required shots for full vaccination will be extended to a new date of January 4, 2022. The White House stated the extension was provided to align with the deadline under new COVID-19-related requirements from the Occupational Safety and Health Administration (OSHA). At this time, however, neither the actual Task Force Guidance document nor any related Q&As have been updated to reflect this change. In addition, the press briefing and Fact Sheet use a different phrase than the Task Force Guidance—leaving unclear whether covered contractor employees will be required to be “fully vaccinated” by the new date or merely have completed all necessary shots.
 - The press briefing and the Fact Sheet describe the new January 4 deadline as the date by which covered employees must “have their final vaccination dose.”
 - The Task Force Guidance, on the other hand, had set out a deadline for employees to become “fully vaccinated” which the Guidance defines 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.”
- **Interaction with OSHA ETS:** A new Q&A provides that covered contractors must comply with the Task Force Guidance and may not choose to instead comply with the OSHA Emergency Temporary Standard (ETS). The White House Fact Sheet echoes that covered contractor workplaces are not also subject to the ETS: “OSHA is also clarifying that it will not apply its new rule to workplaces covered by either the CMS rule or the federal contractor vaccination requirement.” It continues: “And, the newly-released ETS will not be applied to workplaces subject to the federal contractor requirement or CMS rule, so employers will not have to track multiple vaccination requirements for the same employees.” Nonetheless, this could create a complicated patchwork of requirements for some businesses.

- **More Flexibility:** In addition to the extended deadline, both White House press statements and updated Q&As indicate that contractors will have some flexibility over how they enforce vaccination requirements for workers who refuse to become vaccinated. To be clear, this flexibility appears to be limited to the timing of completing the regimen of shots where an employee has sought an “accommodation” under the rule or is in the contractor’s discipline / enforcement process. Specifically, the new Q&As provide that:
 - Agencies “should work with” covered contractors who “are working in good faith and encounter challenges with compliance with COVID-19 workplace safety protocols to address the challenges of compliance with the Task Force Guidance” and should not consider contract termination unless a contractor has failed to “work[] in good faith” to comply.
 - Contractors will be permitted to “determine the appropriate means of enforcement with respect to” employees who refuse the vaccine. For example, before terminating unvaccinated employees, contractors may first go through their “usual processes for enforcement of workplace policies, such as those addressed in the contractor’s employee handbook or collective bargaining agreements” to encourage vaccination.
 - Contractors are not required to make a final determination on medical or religious accommodations for their employees before unvaccinated employees start work on a covered contract or at a covered workplace. Indeed, a “covered contractor may still be reviewing requests for accommodation as of the time that covered contractor employees begin work on a covered contract or at a covered workplace.”
- **Coverage for Affiliates:** New Q&As address certain circumstances where “covered contractor employees” are likely to be present at workplaces controlled by corporate affiliates that do not have a covered contract or where employees of corporate affiliates are working on or in connection with a “covered contract.”
 - Under the new Q&As, for purposes of the Task Force Guidance, “business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly: (i) either one controls or has the power to control the other; or (ii) a third party controls or has the power to control both.”
 - The Q&As now state that if a corporate affiliate of a covered contractor does not otherwise qualify as a covered contractor, the employees of that affiliate are still considered covered contractor employees subject to the Guidance if they perform work at a covered contractor workplace.
 - A “workplace is considered a covered contractor workplace” if “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 at a workplace controlled by a corporate affiliate of that covered contractor.”
- **Subcontractor Flowdown:** The original Q&A included with the Task Force Guidance indicated that a prime contractor’s responsibility for “verifying that subcontractors are adhering to the mandate” was centered on “ensuring that the required clause is incorporated into its first-tier subcontracts....” A new Q&A on the Task Force website returns to this issue even more directly:

“Q: May the prime contractor assume the subcontractor is complying with the clause? A: Yes, unless the prime contractor has credible evidence otherwise.”

 While seemingly a reduction in the prime contractor’s oversight burden, this answer actually creates a host of potential issues: is this effectively a “don’t ask; don’t tell” policy; what is “credible evidence” (a somewhat unique term used primarily in the FAR mandatory disclosure rule) in this context; and what is a contractor required to do if it does have “credible evidence” a subcontractor is not complying?

These updates reflect an ever-evolving, complex compliance framework for federal contractors. The Q&As are being updated frequently to reflect material changes, but the Task Force Guidance has itself

yet to be updated as a whole. With January 4 as the new target date, contractors will need to reevaluate their implementation plans and compliance policies. Jenner & Block continues to follow closely these developments and to assist our clients in applying the requirements to their unique situations.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

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