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Task Force Signals Flexibility On Contractor Vaccination Mandate In New FAQs

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Federal government contractors and subcontractors have been scrambling for weeks to try to digest and implement the COVID-19 safety measures issued by the Safer Federal Workforce Task Force (the "Task Force") in the wake of the Biden Administration's Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors. Our prior analysis of the Task Force's Guidelines are available here, here, and here. On November 1, 2021, the Task Force issued additional guidance on some key questions with which contractors have been grappling.

As previously reported, among other things, the Task Force's Guidelines require contractors to have their employees who work on or in connection with covered contracts, and those who work with them in contractor facilities, vaccinated by December 8, 2021. Since the Guidelines were issued, government agencies have been issuing contract modification notices and incorporating the new requirements into existing contracts. Simultaneously, contractors have been trying to determine how to comply with the December 8, 2021 deadline and what to do with employees who will not be vaccinated by that date or who refuse to be vaccinated.

The Task Force's November 1, 2021 guidance suggests the federal government does not view December 8, 2021 as an absolute deadline, but rather as an aspirational one – provided that contractors are making "good faith" attempts to comply. That being said, absent good faith efforts, agencies are directed to consider contractual remedies. Specifically, in a new FAQ, the Task Force provides:

Covered contractors are expected to comply with all requirements set forth in their contract. ***Where covered contractors are working in good faith and encounter challenges with compliance with COVID-19 workplace safety protocols, the agency contracting officer should work with them to address these challenges****. If a covered contractor is not taking steps to comply, significant actions, such as termination of the contract, should be taken.*

This is consistent with remarks made at an October 27, 2021 press briefing by Jeff Zients, the White House Coronavirus Response Coordinator. Specifically, Mr. Zients stated:

The other piece of this is that vaccination requirements for federal workers and contractors — there are still weeks until we reach those deadlines. And it's important to remember that those deadlines are not cliffs. The federal worker deadline is the 22nd of November, and the federal contractor deadline is not until December [8th].

But even once we hit those deadlines, we expect federal agencies and contractors will follow their standard HR processes and that, for any of the probably relatively small percent of employees that are not in compliance, they'll go through education, counseling, accommodations, and then enforcement.

So, these processes play out across weeks, not days. And so, to be clear, we're creating flexibility within the system. We're offering people multiple opportunities to get vaccinated. There is not a cliff here.

And the purpose, I think, most importantly, is to get people vaccinated and protected, not to punish them. So, we do not expect any disruptions.

Further, the Task Force recognizes addressing accommodation requests may take time and do not have to be completed before December 8, 2021. In another FAQ, the Task Force explains:

The 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. While accommodation requests are pending, the covered contractor must require a covered contractor employee with a pending accommodation request to follow workplace safety protocols for individuals who are not fully vaccinated as specified in the Task Force Guidance for Federal Contractors and Subcontractors.

The Task Force also provided guidance for how contractors should handle employees who refuse to get vaccinated for reasons other than religious beliefs or disability/medical accommodations. The new FAQ provides that contractors "should determine the appropriate means of enforcement with respect to [such] employees," which "may include … using its usual processes for enforcement of workplace policies, such as those addressed in the contractor's employee handbook or collective bargaining agreements." It further suggests that contractors consider the federal government's approach to such employee resistance, which "encourages compliance, including through a limited period of counseling and education, followed by additional disciplinary measures if necessary. Removal occurs only after continued noncompliance."

The new publication also provides some clarity around what constitutes a "covered contractor workplace." The Guidelines define "covered contractor workplace," as one which is "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." All employees who work at a covered contractor workplace are subject to the Guidelines' vaccine, masking, and social distancing requirements. The FAQs addressed the "control" aspect of the definition, and whether a workplace controlled by a contractor's affiliate can be a "covered contractor workplace." The FAQs provide that "[i]f 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, that workplace is considered a covered contractor workplace." In turn, the FAQ states that "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. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, or common use of employees."

These FAQs provide some helpful and welcome guidance for contractors struggling with how to comply with the Guidelines. We will continue to report on new developments.

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