

President Biden Tasks Federal Contractors With Ensuring Adequate COVID-19 Safety Protocols

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The [Path Out of the Pandemic - President Biden's COVID-19 Action Plan](#) is broad and multi-faceted. In addition to a strategy for employers with [at least 100 employees](#), the Plan includes an [Executive Order](#) tasking federal contractors with a direct and primary role in implementing COVID-19 safeguards.

According to the Executive Order:

These safeguards will decrease the spread of COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government. Accordingly, ensuring that Federal contractors and subcontractors are adequately protected from COVID-19 will bolster economy and efficiency in Federal procurement.

The Executive Order exceeds the [mandate](#) that contractor employees on-site at federal facilities be vaccinated or be tested regularly for COVID-19 and follow strict masking requirements. That mandate is still in the [process of implementation](#) for many federal agencies and their contractors.

Task Force Guidance

At the core of the Executive Order is the direction that:

- (1) The [Safer Federal Workforce Task Force](#) (Task Force) issue guidance providing:

[D]efinitions of relevant terms for contractors and subcontractors, explanations of protocols required of contractors and subcontractors to comply with workplace safety guidance, and any exceptions to Task Force Guidance that apply to contractor and subcontractor workplace locations and individuals in those locations working on or in connection with a Federal Government contract or contract-like instrument ...

- (2) The Federal Acquisition Regulation (FAR) Council (FAR Council) issue a FAR contract clause requiring contractors to comply with the Task Force Guidance, to be incorporated into certain federal contracts.

Significantly, the Executive Order itself does not impose vaccine mandates or testing requirements or otherwise disclose any required protocols or safeguards. However, in his speech announcing the Plan, and in the Plan itself, President Joe Biden made clear that federal contractors would be subjected to a vaccine mandate, as will federal employees under a separate Executive Order issued pursuant to the Plan. It is uncertain what requirements will be mandated for federal contractors until the Task Force issues its Guidance.

The Task Force Guidance is to be completed by *September 24, 2021*, but it will not be published until approved by the Office of Management and Budget (OMB).

COVID-19 Safety Protocol Clause

Once the Task Force Guidance has OMB approval, the requirement for compliance with it will be incorporated into a contract clause (COVID-19 Safety Protocol Clause) that will be included, as discussed in more detail below, in new covered contracts beginning on *October 15, 2021* (and possibly earlier). The Executive Order provides:

This 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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COVID-19

Covered contractors and subcontractors at any tier will be obligated to incorporate the COVID-19 Safety Protocol Clause into lower-tier subcontracts.

By *October 8, 2021*, the FAR Council will amend the FAR to require inclusion of the COVID Safety Protocol Clause in procurement solicitations and contracts subject to the Order. Agencies also must take steps to include the language of the COVID-19 Safety Protocol Clause in contracts that are not subject to the FAR by that date.

Task Force Guidance Not Applied to All Federal Contractors, Workers

In the meantime, the Executive Order's coverage follows a structure similar to that for the new federal contractor \$15 per hour minimum wage Executive Order. Similar to the \$15 wage rate requirements, the Task Force Guidance will apply to the following types of federal contracts:

- Procurement contracts for services or construction or a leasehold interest in real property;
- Service Contract Act (SCA) contracts;
- Concession contracts; and,
- Contracts related to federal property and the offering of services to the general public, federal employees, and their dependents.

The Executive Order will not apply to:

- Grants;
- Contracts or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act; or
- Contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold, as that term is defined in section 2.101 of the FAR;
- Employees who perform work outside the United States or its outlying areas, as those terms are defined in section 2.101 of the FAR; or
- *Subcontracts* solely for the provision of products.

Additionally, the Task Force Guidance may apply only to federal contractor workers working “on or in connection with” a covered federal contract. The proposed regulations implementing the \$15 federal contractor wage requirements also may provide some guidance regarding this phrase. At pages 38823 and 38829-30, it states:

The Department has included in the proposed definition of *worker* here a brief description of the meaning of working “on or in connection with” a covered contract. Specifically, the definition provides that a worker performs “on” a contract if the worker *directly performs the specific services called for by the contract* and that a worker performs “in connection with” a contract if the worker's work activities are *necessary to the performance of a contract* but are not the specific services called for by the contract.

(Emphasis added.)

Despite the foregoing, there is some question whether the Executive Order and Task Force Safeguards might apply to all employees who work at a contractor location where work is performed on a covered federal contract. That question arises from the references to “contractor or subcontractor workplace locations” in the Executive Order's discussion of the COVID-19 Safety Protocol Clause above.

Task Force Safeguards on “New” Solicitations as of October 15, 2021

In addition to applying to new contracts and contract solicitations as of October 15, 2021, the Task Force Safeguards also will apply to any:

- Extension or renewal of an existing contract; and
- Exercise of an option on an existing contract.

Despite the “new contract” limitation, the Executive Order also strongly encourages federal agencies “to ensure that the safety protocols ... are applied in the new contract or contract-like instrument” if the contract results from a “solicitation before the effective date ... and [is] entered into ... within 30 days of such effective date [October 15, 2021]”

Similarly, for “all existing contracts and contract-like instruments, solicitations issued between the date of this order and [October 15] and contracts and contract-like instruments entered into between the date of this order and [October 15],” “agencies are strongly encouraged to ensure that the safety protocols required under those contracts and contract-like instruments are consistent with the requirements specified in” the Task Force Guidance.

Thus, it is possible to see a contract clause including COVID-19 safety protocols in solicitations issued and contracts awarded prior to October 15, 2021.

Next Steps

Although much remains to be determined, contractors should consider reviewing their existing and prior contracts to determine if they currently have or have had contracts of the type that will be covered by the Order (and are likely covered by the federal contractor minimum wage and paid sick leave regulations). In particular, contractors providing services should look for FAR Clauses and SCA provisions in both direct federal contracts and subcontracts.

In addition, contractors should assess their current vaccination and testing requirements and protocols in light of the likely requirement of mandatory vaccinations for at least some portion of their workforce. (For examples, see, [EEOC Updates Its Guidance on Vaccine Mandates, Incentives, Confidentiality, To Mandate or Not To Mandate: Department of Justice Weighs In on Vaccination Mandates](#), and [Disability, Leave & Health Management Blog](#).)

If you have any questions about this or other workplace developments, please contact the Jackson Lewis attorney with whom you regularly work.

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