

**Frequently Asked Questions  
Vaccine/Workplace Safety Requirements for Federal Contractors  
(10-21-21)**

The following questions and answers were prepared by government contract experts with the law firm Miller & Chevalier Chartered based on a meeting with the ASA Legal and Legislative Committee.

**Q.1. How will staffing firms know if they are covered as a first tier (or lower tier) subcontractor to a government prime contractor? Will there be a FAR requirement in our agreement with our prime contractor?**

A.1. The requirements will be implemented in civilian contracts via the clause at FAR 52.223-99 (Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors) and in Department of Defense contracts via the clause at DFARS 252.223-7999 (Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors). As provided in the guidance for federal contractors and subcontractors issued Sept. 24, 2021, by the Safer taskforce, “this clause will 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.”

**Q.2. The Safer taskforce guidance seems broader than the comment made by the Office of Management and Budget during its Oct. 12 webinar regarding vendors providing indirect services—how do we reconcile?**

A.2. Covered contractors are expected to follow the written guidance, including “Q17: What constitutes work performed ‘in connection with’ a covered contract? A: Employees who perform duties necessary to the performance of the covered contract, but who are not directly engaged in performing the specific work called for by the covered contract, such as human resources, billing, and legal review, perform work in connection with a Federal Government contract.”

**Q.3. If temporary employees are “covered contractor employees” because they are assigned to a client site that is a “covered workplace,” would the employees working at the staffing firm branch office from which the temporary employees were assigned be considered as working “in connection with” that client site and therefore also be covered contractor employees?**

A.3. Not necessarily. In this hypothetical, the temporary staffing employee is a covered contractor employee only if its employer (i.e., the staffing agency) is a covered contractor and the staffing employee is sent to work at a covered contractor workplace. The employees working from the branch office, however, do not automatically become covered contractor employees simply because the branch office placed the temporary staffing employee at a customer’s covered contractor workplace. Instead, the employees at the branch office only become covered contractor employees if they work on or in connection with a covered contract. Further, the branch office does not become a covered contractor workplace unless at least one employee is likely to be working on or in connection with an ongoing covered contract from that location (e.g., providing back-office accounting support “in connection” with a covered contract).

**Q.4. If someone has a state contract in which the state receives federal money, does that make the state contract a “covered contract” under the FAR?**

A.4. Currently, federally funded state contracts, such as those with school districts, are not covered contracts. A staffing agency must comply with the guidance only when the relevant clause (FAR 52.223-99 or DFARS 252.223-7999) is incorporated into one of its covered contracts or subcontracts. See also below. State government agencies are under no obligation to include the FAR clause in their contracts.

**Q.5. To be considered a “covered contractor employee” must an employee meet all the criteria under the definition or any one of them?**

A.5. An employee will be considered a covered contractor employee if they meet any of the following criteria set forth in the Safer taskforce guidance: The guidance defines “Covered contractor employee” as any full-time or part-time employee of a covered contractor who is working on or in connection with a covered contract; or is working at a covered contractor workplace, regardless of whether they work on or in connection with a covered contract.

**Q.6. Do we need to comply if our prime contractor has not included the required clause? Do we have an affirmative obligation to ask if they will do so?**

A.6. A staffing agency must comply with the guidance only when the relevant clause (FAR 52.223-99 or DFARS 252.223-7999) is incorporated into one of its covered contracts or subcontracts. While there is no legal obligation to inquire, in certain situations it may be prudent for a staffing agency to ask if/when the client expects the clause to be flowed down to its contract with the agency.

**Q.7. There has been discussion about legal challenges to the proposed OSHA Emergency Temporary Standard applicable to private employers. Are there any anticipated legal challenges to the federal contractor executive order?**

A.7. At least one lawsuit has been filed challenging the executive order. The action was brought in late September 2021 by a group of federal workers, service members, and contractor employees who allege that the order’s requirements violate the U.S. Constitution and their religious freedom (*Costin et al. v. Biden et al.*, 1:21-cv-02484 [D.D.C. 2021]).

**Q.8. How will state laws like Montana and the recent Texas order banning vaccine mandates affect the federal executive order?**

A.8. Although the courts have yet to weigh in, the general expectation is that the federal executive order will preempt any conflicting state laws.

**Q.9. Does a home office become a covered contractor workplace if a covered employee is working from home?**

A.9. A covered contractor employee who works from home is subject to the vaccination requirements. However, a home office does not become a covered contractor workplace simply because a covered contractor employee is present. Thus, while the covered employee working from home must be vaccinated, others present in the home office are not required to be vaccinated. Nor is the home office subject to masking or distancing requirements.

**Q.10. Might the "20% of the work on federal contracts" standard used to determine the applicability to a contract of the federal minimum wage be used to determine whether an employee is working "in connection with" a government contract for purposes of the executive order?**

A.10. There is no current indication that such a standard will be used.

**Q.11. How is "workplace" defined? How would the definition apply to corporate campuses with multiple buildings, sites, or facilities?**

A.11. The answer is highly fact-specific. Under the Safer taskforce guidance, "covered contractor workplace" means 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. A covered contractor workplace does not include a covered contractor employee's residence."

The guidance also includes the following Q&A: "Q9: If a covered contractor employee performs their duties *in or at only one building, site, or facility on a campus* controlled by a covered contractor with multiple buildings, sites, or facilities, are the other buildings, sites, or facility controlled by a covered contractor considered a covered contractor workplace? A: *Yes, unless a covered contractor can affirmatively determine that none of its employees in or at one building, site, or facility will come into contact with a covered contractor employee during the period of performance of a covered contract. This would include affirmatively determining that there will be no interactions between covered contractor employees and non-covered contractor employees in those locations during the period of performance on a covered contract, including interactions through use of common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages*" (emphases added).

**Q.12. Are exemptions allowed for medical and religious reasons?**

A.12. Yes. The Safer taskforce guidance provides in Q.4: "Who is responsible for determining if a covered contractor employee must be provided an accommodation because of a disability or because of a sincerely held religious belief, practice, or observance? A: A covered contractor may be required to provide an accommodation to contractor employees who communicate to the covered contractor that they are not vaccinated for COVID-19, or that they cannot wear a mask, because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. A covered contractor should review and consider what, if any, accommodation it must offer. The contractor is responsible for considering, and dispositioning, such requests for accommodations regardless of the covered contractor employee's place of performance. If the agency that is the party to the covered contract is a 'joint employer' for purposes of compliance with the Rehabilitation Act and Title VII of the Civil Rights Act, both the agency and the covered contractor should review and consider what, if any, accommodation they must offer."

**Q.13. If an employee is exempt from vaccination for medical or religious reasons, can the employer require the employee to be tested or work remotely?**

A.13. While the executive order, unlike the proposed Occupational Safety and Health Administration Emergency Temporary Standard, does not provide a testing alternative to vaccination, nothing in the executive order would bar an employer from requiring employees who are exempt from vaccination for valid medical or religious reasons to undergo regular testing as a condition of coming into the

workplace, or to work remotely if feasible. The employer should, however, determine whether any other federal or state laws prohibit a testing requirement in such circumstances.

**Q.14. If a staffing agency contract does not contain the FAR clause, could the agency nonetheless be viewed as a covered contractor based on a joint employer relationship with a client that is a covered contractor?**

A.14. The guidance assumes each employee has one “employer” but does not address how joint employment affects an employer’s status as a covered contractor. In the absence of specific guidance, it is reasonable to assume that the obligation under the FAR clause will be dictated by whether an employer’s contract includes the clause. If the staffing agency contract does not contain the clause, then the agency would not be a covered contractor simply by virtue of the client being a covered contractor and the fact that the client jointly employs the agency’s workers. The client’s joint employer status may, however, mean that the client would itself have an obligation (assuming it is a covered contractor) to comply with the executive order with respect to the joint employees.

**Q.15. Government contracts require various types of certifications by contractors relating to payments for services, in which errors or misstatements could give rise to a “false claim” and potential liability. What are the risks if a staffing agency incorrectly certifies that it complies with the executive order? Can liability be avoided by not making such certifications?**

A.15. The FAR clause does not require a certification of compliance. There could still be False Claims Act liability, however, if a violation of the mandate is considered a material breach of the contract, and the contractor continues to bill even though it “knows” it is in violation. For this purpose, “knowledge” includes even “deliberate ignorance” or “willful disregard” of the truth or falsity.

**Q.16. What practical recommendations does legal counsel have for steps toward compliance for staffing agencies?**

A.16. A staffing agency must comply with the guidance when the relevant clause (FAR 52.223-99 or DFARS 252.223-7999) is incorporated into one of its covered contracts or subcontracts. Thus, as a practical first step, a staffing agency should review its current contracts/contracting pipeline and consider conferring with its potentially impacted clients to determine if or when the clause might be included in one or more of its agreements. As a next step, and subject to applicable employment and privacy laws, a staffing agency should consider gathering available data on the work location(s) and vaccination status of its workforce. This will help the staffing agency more efficiently implement the new requirements if/when the relevant clause (FAR 52.223-99 or DFARS 252.223-7999) is incorporated into one of its covered contracts or subcontracts.

**Q.17. Can an employer avoid the mask mandate for the entire building by removing covered contractors from the premises and assigning them to work from home until the building is no longer in the orange or red zone?**

A.17. Yes—an employer can prevent a location under its control from becoming a “covered contractor workplace” (i.e., a location that generally is subject to vaccination, masking, and distancing requirements for all employees) provided the employer can affirmatively determine that no employee of any covered contractor working on or in connection with any covered contract is likely to be present during the period of performance for any covered contract.

**Q.18. Does a staffing agency need to have a Covid-19 coordinator at each location, or can the client's coordinator cover our employees at that site?**

A.18. There is no express requirement for a coordinator at each site under the federal contract rules. In the absence of an express requirement, an employer should assign the coordinator(s) in a manner that is reasonable for the employer's business operations. The guidance does not address whether the client's coordinator could perform that function with respect to the staffing agency's employees. Arguably, the client's coordinator could perform that function given that clients generally are considered joint employers of the agency's employees. As a practical matter, however, most clients likely will expect the staffing agency, as the primary employer, to handle that function.

**Q.19. How should a staffing agency handle a situation where a covered contractor client grants vaccination exemptions for its own employees, but not the agency's employees?**

A.19. Under the guidance, the decision to grant or deny an exemption rests with the "employer" (i.e., the staffing agency in this hypothetical). A staffing agency should consider pushing back on a client who refuses to recognize valid exemptions for agency employees granted by the agency. Failure to recognize a proper exemption may expose the client to liability.

**Q.20. Do employees of a covered contractor have to be vaccinated if they work remotely and do not work on or in connection with the government contract?**

A.20. No.

**Q.21. If a staffing agency is a covered contractor that performs recruiting services under the covered contract, must all the agency's recruiters working in the building where the services are performed be vaccinated, whether they work remotely or on site?**

A.21. The answer differs depending on whether the recruiters work remotely or on site. If recruiters are likely to perform work on or in connection with an ongoing covered contract at a specific location controlled by the staffing agency (e.g., an office), that location is a covered contractor workplace and all employees at that location (recruiters and others) must be vaccinated—even if they do not perform work on or in connection with a covered contract. If, however, the recruiters perform all their work on or in connection with a covered contract remotely, then a location controlled by the staffing agency will not become a covered contractor workplace, unless one or more of the recruiters is likely to perform work on or in connection with an ongoing covered contract at that location.

**Q.22. In the prior scenario, if the staffing agency performing recruiting services maintains "back-office" operations like billing, legal, and HR in another state or physical location, do the back-office employees have to be vaccinated?**

A.22. Yes. If the employees performing such back-office operations are deemed to work "in connection" with a covered contract, then they and all other employees working at the same location must be vaccinated, assuming the location is controlled by the staffing agency.

**Q.23. Some clients allow vaccinated people not to wear masks on site. Since staffing agencies generally are not present at the workplace, what is their risk in such situations?**

A.23. If a staffing agency assigns vaccinated employees to work at a covered contractor workplace where the client does not enforce the applicable mask requirements at that location, the agency's risk depends primarily on its knowledge of any noncompliance and/or the steps it takes if it becomes aware of such a noncompliance (e.g., notifying the customer and, if necessary, removing its employees from the site until remedied). The staffing agency's risk arguably is lower if the required clause has not been incorporated into a staffing agency's covered contracts or subcontracts.

**Q.24. What are the requirements for verifying employee vaccination? Can an employer just "check" the vaccination document or must they keep copies?**

A.24. Whether to merely check the documents or save copies is a business judgment and should be considered based on applicable federal/state laws governing the treatment and protection of personal health information (PHI). The federal contract guidance provides detailed instructions on the documentation that can be used for verification purposes under either the check or save approaches. As noted below, employers can satisfy the requirement by looking at or saving copies of the document as opposed to the original document.

The guidance says that a covered employer can require covered contractor employees to "*show or provide*" their employer with one of the following documents: a copy of the record of immunization from a health care provider or pharmacy; a copy of the Covid-19 Vaccination Record Card (CDC Form MLS-319813\_r, published on Sept. 3, 2020); a copy of medical records documenting the vaccination; a copy of immunization records from a public health or state immunization information system; or a copy of 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. Covered contractors may allow covered contractor employees to *show or provide* to their employer a digital copy of such records, including, for example, a digital photograph, scanned image, or PDF of such a record. The covered contractor shall ensure compliance with the requirements in this guidance related to the showing or provision of proper vaccination documentation (emphasis added).

Employee self-attestation is not sufficient, however. In this regard, the guidance includes the following Q&A: "Q3: What should a contractor employee do if a covered contractor employee has lost or does not have a copy of required vaccination documentation? A: If covered contractor employees need new vaccination cards or copies of other documentation proof of vaccination, they should contact the vaccination provider site where they received their vaccine. Their provider should be able to provide them with new cards or documentation with up-to-date information about the vaccinations they have received. If the location where the covered contractor employees received their COVID-19 vaccine is no longer operating, the covered contractor employees should contact their State or local health department's immunization information system (IIS) for assistance. Covered contractor employees should contact their State or local health department if they have additional questions about vaccination cards or vaccination records. An attestation of vaccination by the covered contractor employee is not an acceptable substitute for documentation of proof of vaccination."

**Q.25. We have multiple locations with clients who are federal contractors or subcontractors. Regardless of whether those contractors currently include the FAR clause, should we proactively**

**require vaccination of all our corporate employees since they support all our branch locations—including those serving clients with federal contracts?**

A.25. The timing of this decision is a business judgment. To get “ahead of the curve,” a company could decide to instruct corporate office employees to begin the vaccination process based on the federal guidance requirements. See also “practical recommendations” discussed in Q.16 above.

**Q.26. Is it reasonable to simply require all employees to be vaccinated without regard to specific legal requirements of the FAR clause/guidance to avoid the confusion and complexity of complying on a case-by-case basis?**

A.26. Some employers appear to be taking this approach, not only because it may be more operationally efficient but also because a major policy objective of the federal guidance is to use the purchasing power of the federal government to “strongly encourage” vaccination for as many employees as possible, even when not technically required. This may prompt staffing clients to adopt a default policy of “flowing down” the FAR clause without regard to whether they need to be included.

*This document does not constitute legal advice and does not address all relevant considerations under the federal contractor vaccine/workplace safety requirements. Each ASA member must independently determine if it is compliant with the rules based on the advice of its own counsel and the latest guidance published by the U.S. government. Future regulations and guidance may modify the information contained above.*