issue paper
American Staffing Association
277 South Washington Street, Suite 200 ▪ Alexandria, VA 22314-3675 ▪ 703.253.2020 ▪ 703.253.2053 fax ▪ americanstaffing.net

Nov. 1, 2021

Alex L. Sarria, Esq.
Miller & Chevalier Chartered
202-626-5822
asarria@milchev.com

Jason N. Workmaster, Esq.
Miller & Chevalier Chartered
202-626-5893
workmaster@milchev.com

Contact: Stephen C. Dwyer, Esq.
Senior Vice President, Chief Legal and Operating Officer
American Staffing Association
703-253-2037
sdwyer@americanstaffing.net

Contact: Edward A. Lenz, Esq.
Senior Counsel
American Staffing Association
703-253-2035
elenz@americanstaffing.net

Vaccine/Workplace Safety Rules for Federal Contractors

Introduction

On Sept. 9, 2021, the Biden administration issued the Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors ("executive order" or "order"), directing all executive departments and agencies to ensure "contracts and contract-like instruments" covered by the order require compliance with the Covid-19 workplace safety requirements developed by the Safer Federal Workforce Task Force ("taskforce"). On Sept. 24, 2021, the taskforce published guidance for federal contractors and subcontractors regarding Covid-19 workplace safety requirements ("guidance"), which includes vaccination, masking, and physical distancing, and compliance monitoring obligations. Under the guidance, "covered contractor employees" and "covered contractor workplaces" must comply with the mandate. There are only two bases for an exception from these requirements: (1) a disability (including medical conditions); or (2) a sincerely held religious belief, practice, or observance.

Following issuance of the guidance, the Federal Acquisition Regulatory Council issued a Federal Acquisition Regulation deviation clause, FAR 52.223-99, for civilian agencies to use to implement the executive order's requirements in contracts covered by the order. In addition, the FAR Council "strongly encouraged" the integration of the clause into contracts that are not covered by the executive order (such as supply contracts or contracts that do not exceed the simplified acquisition threshold [SAT] of $250,000, per FAR 2.101). Similarly, the Department of Defense issued a Defense Federal Acquisition Regulation Supplement deviation clause, DFARS 252.223-799, for use in DoD contracts. The DFARS deviation clause materially tracks the FAR deviation clause. However, DoD only noted that the DFARS deviation clause "may" be used in noncovered contracts and did not state that such use was "strongly encouraged."

This paper builds on questions and answers (see separate copy) developed from a meeting with the ASA Legal and Legislative Committee on Oct. 15. The paper provides a fuller explanation of the scope and essential definitions of the executive order and guidance and addresses several factual scenarios staffing agencies are likely to face, as well as when vaccination or masking and physical distancing requirements might be imposed. While this document reflects the most current vaccine and workplace safety standards as of Oct. 27, 2021, contractors and subcontractors can anticipate changes to requirements based on the final FAR clause and updates to the taskforce FAQs.

I. Scope and Definitions

A. Covered Contracts and Subcontracts

The executive order directs executive agencies and departments to implement the taskforce guidance via a contract clause (i.e., the aforementioned "deviation clause') in "covered contracts and contract-like instruments." Covered contracts include most service contracts (including contracts for construction or labor). Exempt from the coverage of the executive order, however, are contracts exclusively for products or those

that fall beneath the SAT. Nevertheless, agencies have been "strongly encouraged" to incorporate the requirements even into such contracts.

The new requirements are not mandated for inclusion in new, covered contracts unless they are entered into after Nov. 14, 2021, in which case covered employees must be fully vaccinated by Dec. 8, 2021. For contracts awarded before Oct. 15, 2021, where performance is ongoing, the requirements must be incorporated into the contract when the next option is exercised, or an extension is made. For these contracts, employees must be fully vaccinated on the first day of the period of performance for the contract option or extension. When incorporation is not mandatory, the FAR and DFARS clauses require incorporation of the clause into ongoing contracts via bilateral modification, with compliance dates subject to agency and project-specific timelines.

The FAR and DFARS clauses must also be flowed down for subcontracts for services that (1) exceed the SAT, and (2) are for services performed in whole or in part within the U.S. or its outlying areas.[1] In general, prime contractors are only required to flow the clause requirements down to relevant subcontracts and need not police its subcontractors' compliance with the new requirements. If, however, the prime has reason to believe a subcontractor is not in compliance, the prime will need to carefully assess whether it needs to take additional measures, which could include notifying the government of the noncompliance.

B. Covered Employees and Workplaces

The executive order requirements apply to "covered contractor employees," who are employees of a covered contractor working on or in connection with a covered contract *and/or* at a contractor-controlled or federal workplace. Employees working on or in connection with a covered contract are full-time and part-time employees who perform the work that is specifically being contracted for, as well as those who provide necessary support for the covered contract[2], such as human resources, billing, and legal review. In the case of staffing agencies, these requirements could apply to both the agency's internal home office and branch staff, including franchise offices, and the temporary and contract employees who are assigned to clients.

Temporary employees generally are considered employees of the staffing agency for which they work. Consequently, as a technical matter, there is a strong argument that they would be subject to the new requirements only if the staffing agency itself is considered a covered contractor/subcontractor. As a practical matter, however, we

[1] Per the FAR and DFARS clauses, the U.S. or its outlying areas means: (1) the fifty states; (2) the District of Columbia; (3) the commonwealths of Puerto Rico and the Northern Mariana Islands; (4) the territories of American Samoa, Guam, and the U.S. Virgin Islands; and (5) the minor outlying islands of Banker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

[2] While the guidance gives some indication of which services are considered "in connection" with a federal contract (billing, human resources, and legal review) and which are not (facilities support like food services or security), the definition of necessary support for purposes of the executive order is not entirely clear. Thus, the analysis and conclusions set forth in this issue paper may need to be reconsidered if the taskforce further clarifies or changes its requirements.

expect prime contractors that retain staffing agencies to require temporary employees to fully comply with the guidance if those temporary employees will be assigned to work on a covered government contract or work at a covered contractor workplace.

Covered contractor workplaces broadly encompass any location that a covered contractor controls at which an employee working "on or in connection with a covered contract" is expected to be present during the period of performance. This does not include a covered employee's residence, for the purpose of masking and physical distancing requirements. While nonemployees who provide on-site services at contractor workplaces, such as food, security, or cleaning support, technically are not "covered employees" simply because they work at a covered site, contractors are encouraged to require compliance with the guidance in those support contracts as well.

Notably, the presence of a single covered contractor employee at a building or facility will convert that building or facility into a covered contractor workplace—even if the other employees at the building or facility perform functions completely unrelated to the federal contract. Consequently, every employee within that workplace would need to comply with the guidance vaccination requirements, and the workplace would be subject to masking and physical distancing requirements.

C. Requirements

The guidance sets forth three principal categories of compliance: vaccination, masking and physical distancing, and compliance monitoring.

1. Vaccination

Under the vaccination requirements, all covered contractor employees must be fully vaccinated by the relevant compliance date. An employee is considered "fully vaccinated" if they are two weeks out from the second dose of an approved two-dose vaccine (Pfizer-BioNTech and Moderna), or the sole dose of an approved single-dose vaccine (Johnson & Johnson/Janssen). Employees must also be able to provide verification of vaccination, such as a vaccination card or other medical record. An employee's self-attestation to their vaccination status does not meet the verification requirements of the guidance. Absent an applicable exception, there are no alternatives or opt-outs to vaccination (such as regular Covid-19 testing, prior Covid-19 infection, or antibody testing) for covered contractor employees. As of Oct. 25, 2021, the guidance has not addressed the impact of boosters on full vaccination status.

There are exceptions from the vaccination requirements for employees based on disabilities (including medical conditions) or sincerely held religious beliefs, practices, or observances. Contractors must determine when an exception is appropriate in keeping with their regular medical exception protocols. The taskforce FAQs provide limited direction on how disability exceptions should be determined, largely instructing contractors to defer to the Centers for Disease Control's recommendations regarding vaccination timing, the relationship between vaccinations and pre-existing conditions, and the impact of participation in clinical trials on vaccination.

2. Masking and Physical Distancing

Covered contractor workplaces must implement masking and physical distancing requirements based on the vaccination status of the present employees and the transmission level of the workplace as designated by the CDC Covid-19 data tracker county view website. In areas of low or moderate transmission, fully vaccinated individuals do not need to wear a mask or practice physical distancing in indoor settings. For areas of high or substantial transmission, fully vaccinated individuals must still wear a mask in indoor settings but are not required to practice physical distancing. Individuals who are not fully vaccinated must wear masks and practice physical distancing in all indoor settings, regardless of transmission levels.

Contractors are expected to check the data tracker website in all areas where they have covered contractor workplaces on a weekly basis in order to update the requirements for those workplaces. Contractors may provide accommodations for mask-wearing requirements based on disability or a sincerely held religious belief, practice, or observance. Contractors must determine what, if any, accommodation is appropriate.

3. Compliance Monitoring

Covered contractors must appoint a compliance monitor to disseminate information related to the relevant workplace safety requirements and coordinate the documentation of employee compliance with vaccination requirements. This individual may already be implementing local or state Covid-19 safety laws[3], and as such may need to adjust their current duties to reflect the new requirements of the executive order.

II. Common Factual Scenarios

The executive order, and subsequent guidance and FAR and DFARS deviation clauses, largely are written for traditional workplaces where contractor employees consistently work in the same location on the same project. Given the flexible nature of the staffing industry, the diversity in employer–employee relationships, and the industry's inherent need to allocate employees to multiple locations to fulfill a variety of duties, a few scenarios are helpful to illustrate the relationship between the executive order's requirements and the staffing industry's dynamic workforce.

A. Scenario #1

A staffing agency places temporary workers at a client site pursuant to a subcontract with a prime contractor who is working on a contract covered by the executive order. The prime contractor has flowed down the relevant clause (FAR 52.223-99 or DFARS 252.223-7999) to the staffing agency because the staffing agency subcontract is a service contract over the SAT of $250,000 and is being performed within the U.S. The staffing agency is therefore a covered contractor.

[3] There is an open question as to how conflicts between the federal mandate and state laws/orders might be resolved, particularly those state laws that ban vaccine mandates. In general, there is well-established authority that federal law preempts any conflicting state law. *See Arizona v. United States*, 567 U.S. 387, 398–40 (2012). The issue here, however, is fairly novel, and it is difficult to predict how it would ultimately be resolved. For its part, the federal government has taken the position that federal law preempts any state or local law that conflicts with the executive order and implementing guidance.

In this scenario, the temporary workers are covered employees working on a covered contract and therefore the staffing agency must ensure that they are vaccinated. Moreover, because the agency is a "covered contractor" by virtue of the flowed down clause, any workplace controlled by the agency (e.g., its headquarters or branch office) where an employee working on or in connection with the covered contract (e.g., billing, payroll) is likely to be present is a "covered contractor workplace." In such case, *all* employees of the staffing company at that workplace are covered employees, regardless of whether they are working directly or indirectly on a covered contract. All employees present or likely to be present at the workplace controlled by the staffing agency must therefore be vaccinated and the workplace must comply with the masking and physical distancing requirements of the guidance.

In certain circumstances, staffing agencies could consider adopting an alternative strategy for compliance. For example, if a limited number of employees at an office location work on or in connection with a covered contract, then it may be feasible to have those individuals perform their contract-related duties from a remote location (e.g., from home) to avoid converting an entire office into a covered contractor workplace (note: covered employees must be vaccinated even if they work remotely). Similarly, the guidance provides, in an FAQ (#8), that a facility controlled by a covered contractor might not be viewed as a covered contractor workplace if the covered contractor can "affirmatively determine" that none of its noncovered contractor employees working in separate areas will come into contact or interact with a covered contractor employee during the performance of a covered contract, including interactions in common areas such as lobbies, elevators, and dining areas. Staffing agencies should consult with counsel to determine whether these alternative strategies are viable.

B. Scenario #2

A staffing agency places temporary workers at a client site pursuant to a subcontract with Client A, who is working on a contract covered by the executive order. Client A has flowed down the relevant clause (FAR 52.223-99 or DFARS 252.223-7999) to the staffing agency because the staffing agency subcontract is a service contract over the SAT of $250,000 and is being performed within the U.S. The staffing agency is therefore a covered contractor.

Simultaneously, the staffing agency sends employees to a workplace of Client B where the employees are not performing work on or in connection with a covered contract. However, Client B does have other contracts covered by the executive order, making Client B a covered contractor, and other Client B employees are working on or in connection with the covered contract at this workplace. In this scenario, the temporary employees assigned to Client B's site are covered contractor employees because: (1) they are employees of a covered contractor (i.e., the staffing agency); and (2) they are working at a covered contractor workplace (i.e., controlled by Client B).

In this regard, the guidance defines covered contractor employee "as any full-time or part-time employee of *a* covered contractor…working at *a* covered contractor workplace." The plain meaning of this language suggests that an individual can be a covered contractor employee because they are an "employee of a covered contractor" under one subcontract (the subcontract with Client A) and work at a covered contractor

workplace pursuant to a separate subcontract (the subcontract with Client B). Absent a change in the guidance, the temporary employees assigned to Client B will be subject to the vaccination requirements and must comply with applicable masking and physical distancing requirements while at Client B's workplace.

C. Scenario #3

A staffing agency places temporary employees at a client's covered contractor workplace. The staffing agency itself is not a covered contractor because it has not received the relevant flow down clause (FAR 52.223-99 or DFARS 252.223-7999) and does not otherwise perform work on or in connection with a covered contract. In this scenario, the temporary employees assigned to the client site are not technically covered employees and their mere presence at a covered contractor workplace does not make them covered.

As a practical matter, however, the staffing agency should anticipate that the covered contractor will insist on receiving fully vaccinated temporary employees if those persons will work at the client's covered site. Indeed, it appears that many large clients of staffing agencies are simply adopting internal policies requiring vaccinated temporary workers and requiring the staffing agencies to comply, rather than attempting to flow down the relevant clause in a covered subcontract. In these circumstances, it is up to the staffing agency, as a matter of business judgment, to decide whether or not to accept staffing engagements on these terms.

D. Scenario #4

A staffing agency assigns temporary employees to perform indirect support duties (such as back-office functions) for a client that is a covered contractor at a location where there are no covered contractor employees (such as at home or at a staffing agency facility). The staffing agency itself is not a covered contractor based on the flow down of the relevant clause (FAR 52.223-99 or DFARS 252.223-7999). In this scenario, the temporary employees are not subject to vaccination requirements because the staffing agency is not a covered subcontractor subject to the executive order. Moreover, they are not working at a covered contractor workplace, and so there is no apparent safety or health-related basis for the client to require that they comply with the guidance.

E. Scenario #5

A staffing agency places temporary employees at a client site that is not controlled by a covered contractor and where the temporary employees do not perform work on or in connection with a covered federal contract. The staffing agency itself is not a covered contractor based on the flow down of the relevant clause (FAR 52.223-99 or DFARS 252.223-7999). The temporary employees do not need to comply with vaccination requirements because they are not employees of a covered contractor, nor are they working at a covered contractor workplace. Nor is the workplace to which they are assigned subject to the federal masking and physical distancing policies, although it may be subject to local or state requirements.

F. Scenario #6

A staffing agency has branch or franchise locations that assign temporary employees to work on covered contracts held by clients. These clients have appropriately included the relevant clause in their service agreements with branch locations (FAR 52.223-99 or DFARS 252.223-7999), so those agreements are covered subcontracts. Some corporate employees of the staffing agency (located at a corporate home office) perform support functions that are necessary to the work performed by the branch office and/or temporary employees under the covered subcontracts (e.g., billing, payroll, HR).

In this scenario, any employee of the branch location that performs work on or in connection with the covered subcontracts is a covered contractor employee and must be vaccinated. The branch office is also a covered contractor workplace, and so all others working at that location must be vaccinated and observe masking and distancing requirements. In addition, there is a reasonable chance that the corporate office employees who perform work "in connection" with the covered subcontracts (i.e., by providing essential support functions) would be considered covered employees (even though there is a technical argument that the overarching corporate entity is not a "covered contractor," given that the agreement in question is with the branch location in this hypothetical). In such case, any site where those corporate employees work, including the corporate home office, would be considered covered contractor workplaces—and everyone at those workplaces or offices would have to comply with vaccination requirements, even if they do not perform the support functions for the covered contract. Additionally, the workplaces or offices would have to comply with masking and physical distancing requirements.

As the guidance currently stands, instructing employees who merely work "in connection" with a covered contract to work from home or in a separate location may be a valid way to avoid vaccination and masking and physical distancing requirements for their entire office (see alternative compliance strategies discussed in Scenario #1). But the employees working in connection with the covered subcontract would still be subject to vaccination requirements if they worked from home or another separate location. We note again, however, that the guidance can change, and its underlying policy goal is to encourage vaccination for as many people as possible, so the viability of this practice may only be temporary.

G. Scenario #7

A staffing agency's branch office assigns temporary employees to a client site that is a "covered contractor workplace." At this location, the temporary employees will work on a covered contract held by the client. The client has appropriately included the relevant clause in its service agreement with the branch office (FAR 52.223-99 or DFARS 252.223-7999), so the agreement is a covered subcontract. As in Scenario #6, an employee of the branch office who works on or in connection with a covered contract (either the client's covered contract or the branch office's covered subcontract) is a covered contractor employee. This could potentially include branch employees who recruited and/or placed the temporary workers for the client's covered contract.

The final determination on such recruiters/placement personnel, however, requires a fact-specific analysis of the duties performed by the branch office employees under the relevant services agreement between the branch office and the contractor. If the branch office is required to find and send temporary employees—but it is not required to place individuals for a federal contract or program (or exercise judgment about their qualifications to work on a covered contract)—then there is an argument the branch office is not performing a function that is necessary to a covered contract. If, however, the branch office employees are required to recruit and place candidates specifically for work on a covered contract or program (or to determine if a particular candidate is qualified to work on a covered contract), then it is more likely the branch office employees could be viewed as working "in connection with" a covered contract.

Given the potential complexity of these agreements and duties, staffing agencies should consider consulting with counsel before adopting a compliance strategy.

Conclusion

The complexity of the federal contractor rules and the highly varied factual scenarios that would need to be analyzed on a case-by-case basis to determine whether the requirements apply has prompted some staffing agencies to impose a blanket vaccine mandate even if it is not required. This would be more efficient and less costly and would address the practical reality that the federal policy of "strongly encouraging" vaccination of as many employees as possible may prompt many staffing clients to flow down the FAR clause without regard to whether it technically needs to be included. An unknown downside to a blanket vaccine policy, of course, is the potential adverse impact on the availability of labor if a significant number of temporary employees simply refuse to be vaccinated and leave the formal workforce.

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.