

COVID-19 Vaccine Mandate for Existing Federal Contractors

On September 9, 2021, President Biden signed Executive Order 14042, “Ensuring Adequate COVID Safety Protocols for Federal Contractors.” The Executive Order requires that federal department and agency contracts include a contractual clause forcing all contractors and subcontractors to comply with COVID-19 safety guidance published by the Safer Federal Workforce Task Force (the “Task Force”). Since the release of the Executive Order, the Task Force issued guidance mandating COVID-19 vaccination for all employees of covered federal contractors by December 8, 2021.¹

The vaccine mandate applies to the following federal contracts:

(1) new contracts awarded on or after November 14 from solicitations issued before October 15; (2) new solicitations issued on or after October 15 and contracts awarded pursuant to those solicitations; (3) extensions or renewals of existing contracts and orders awarded on or after October 15; and (4) options on existing contracts and orders exercised on or after October 15.

Issuance of Agency Deviations to Implement Executive Order 14042, September 30, 2021. The Task Force guidance specifically excludes contracts below the simplified acquisition threshold (\$250,000) and contracts or subcontracts for the manufacture of products.

In its guidance, the Task Force “strongly encourages” federal departments and agencies to apply the vaccine mandate requirements to contracts that do not fall into the categories listed above. The guidance suggests that many federal departments and agencies will attempt to require COVID-19 vaccination for contractors with existing contracts. Contractors with existing federal contracts are concerned they will not be able to: (1) recover the costs associated with enforcing a vaccine mandate, or (2) appropriately address delays resulting from a vaccine mandate in their existing contracts. Most likely, many federal departments and agencies will request that contractors execute a bilateral change to amend the existing contract and incorporate the new COVID-19 vaccine mandate.

Potential Issues

The imposition of a vaccine mandate on contractors could increase contractors’ costs and time of performance under federal contracts. These issues include the costs of coordinating employee vaccinations, verifying employee vaccination records, evaluating the legitimacy of vaccine exemption claims, responding to claims of discrimination and other lawsuits, and responding to union grievances and arbitrations. Additionally, the imposition of a vaccine mandate may result in significant labor issues as employees who refuse to get vaccinated leave and seek employment in industries that do not require vaccination. The loss of employees will

¹ As of the date of this Contracts Bulletin, the Occupational Safety and Health Administration (OSHA) has not released its COVID-19 vaccine mandate guidance.

not only increase costs for contractors as they try to replace employees but could also cause construction delays.

Bilateral Change

Class Deviation CD-2021-13 released on September 30, 2021, provides details regarding the General Services Administration's ("GSA") approach to including the vaccine mandate in existing federal contracts. The Class Deviation also provides insight into how other federal departments and agencies may choose to request modifications to existing contracts.² Class Deviation CD-2021-13 directs contracting officers to send a letter with a contract modification request asking contractors to execute a bilateral change to the existing contract incorporating the Task Force guidance.³ The Class Deviation requires contracting officers to make as many modifications as possible by November 14, 2021.

The Federal Acquisition Regulation ("FAR") defines a bilateral contract change as "a contract modification that is signed by the contractor and the contracting officer. Bilateral modifications are used to: (1) Make negotiated equitable adjustments resulting from the issuance of a change order; (2) Definitize letter contracts; and (3) Reflect other agreements of the parties modifying the terms of contracts." 48 C.F.R. § 43-103(a) (emphasis added). A bilateral contract change under FAR is similar to a change order under AIA contracts. A bilateral change gives contractors the opportunity to negotiate equitable adjustments in the contract price and contract time in order to receive compensation for implementing the Task Force guidance. As a practical matter, this means contractors have the opportunity to negotiate with the GSA for a mutually acceptable bilateral change that takes into account the contractor's costs. Contractors should carefully consider how implementation of the vaccine mandate and other Task Force guidance may increase costs or delay performance and negotiate the bilateral change accordingly.

Subcontractors with existing contracts should also expect a bilateral change request to incorporate the vaccine mandate. The Task Force guidance explicitly requires that the vaccine mandate flows down from prime contractors to subcontractors. Furthermore, both the Task Force guidance and Class Deviation strongly encourage contracting officers to request a bilateral change for contracts below the simplified acquisition threshold of \$250,000.

While the guidance "encourages" the bilateral changes, the government does use its power to force contractors and reach an agreement. The Class Deviation reinforces the Task Force guidance and makes clear that accepting the bilateral change is required before the GSA will renew a contract, extend the period of performance of a contract, or exercise a contract option. Additionally, although the bilateral change is not mandatory for continued performance of existing contracts, the GSA may take adverse action against contractors that refuse to modify existing contracts to incorporate the Task Force Guidance. The Class Deviation specifically states that the GSA may temporarily hide contractor information on the GSA website or flag contractors that have not accepted the bilateral change.

² The Department of Defense has also issued a Class Deviation with nearly identical requirements.

³ A copy of the contract modification letter is attached to this Contracts Bulletin as Exhibit A.

Conclusion

Significant uncertainty still exists surrounding Executive Order 14042 and related guidance from the Task Force. While current guidance does not require vaccinations for existing contractors, the government will likely use its leverage to impose bilateral contract changes. Contractors should proceed carefully to protect their rights to compensation for increased costs and delay under FAR.



Color coding of this template is as follows:

BLACK - standard text

BLUE - text that must be filled in by acquisition team

[Date]

[Contractor's Name]

[Contractor's Street Address]

[Contractor's City, State and Zip Code]

Subject: Contract Modification - New Clause for Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors - [Procurement Instrument Identifier/Lease Contract Number]

Dear [Contractor's POC name],

GSA appreciates the hard work and dedication of our contractors. The health and safety of GSA employees, contractors and their families is our top priority. In order to ensure the health and safety of the Federal workforce and contractor community, the President signed [Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors](#). The requirements in the Executive Order are being implemented via a FAR deviation. The clause in the FAR deviation will be incorporated into GSA contracts via a bilateral modification.

If you hold a GSA contract for services, construction, or a leasehold interest in property that exceeds the simplified acquisition threshold (SAT) or the simplified lease acquisition threshold (SLAT), GSA strongly encourages you to accept this contract modification at this time. The modification is **mandatory** before GSA will renew, extend the period of performance of your contract, or exercise an option.

Acceptance of the contract modification is also **mandatory** for all Federal Supply Schedule contractors.

If you hold a contract at or below the SAT/SLAT or a contract only for products, GSA strongly encourages you to accept the modification.

For IDIQ contracts, including all Federal Supply Schedule contracts, you must sign the modification by **November 14, 2021** to be eligible for new orders. GSA may take

interim actions if a signed modification is not returned to GSA by **November 14, 2021**, such as:

- Temporarily hiding contractor information on GSA websites and/or e-tools
- Flagging contractors that have not accepted the modification

Once an IDIQ contract is modified, the clause applies to the exercise of options on all existing orders and to all future orders.

Based on the urgency of this issue, please return your signed contract modification as soon as possible and no later than **November 14, 2021**.

For more information, please visit <https://gsa.gov/covid19>.