

# New Executive Order Imposes COVID-19 Vaccine Mandate on Federal Contractor Employers

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In an attempt to contain the continuing COVID-19 pandemic, President Biden issued two Executive Orders on September 9, 2021 that mandate COVID-19 vaccines for [federal government employees](#) and employees of [federal government contractors](#). Although key details of these vaccine mandates have yet to be defined, the new measures appear to build on the administration's [recent mandate for vaccination or testing](#) of contractor employees who work on-site at federal locations. As a result of these new mandates, federal government contractors will soon be presented with complex and risk-laden decisions as employees seek exemptions, to the extent available, from the vaccine mandate.

## The Basics of the Executive Orders

The first executive order is applicable to federal government employees, and requires the Safer Federal Workforce Task Force (Task Force) to issue guidance requiring a vaccine mandate for federal agency employees. Federal agencies are then required to implement the Task Force's guidance "with exceptions only as required by applicable law." The second executive order is applicable to federal government contractors, and provides that new government contracts and contract-like instruments must include a clause requiring the contractor and "any subcontractors (at any tier)" to comply with "all guidance" issued by the Task Force. Pursuant to the terms of the contractor Executive Order, the clause's requirements are applicable to "any workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument." The Executive Order applicable to federal contractors provides that the Task Force will issue its guidance by September 24, 2021, and outline "definitions of relevant terms," "explanations of protocols required of contractors and subcontractors," and "any exceptions" to the vaccination mandate.

## What Types of Federal Contracts Trigger the Vaccine Mandate?

The vaccine mandate is applicable to any contract or contract-like instrument that is entered into, extended, renewed, or has an option exercised on or after October 15, 2021. However, the Executive

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Order is effective immediately and agencies are “strongly encouraged, to the extent permitted by law” to extend the vaccine mandate to existing contracts not otherwise subject to the Executive Order. The Executive Order adopts the definition of “contract or contract-like instrument” from the [Department of Labor’s minimum wage regulations](#), and thus presumably excludes procurement contracts excluded from the Davis-Bacon Act and service contracts excluded from the Service Contract Act. The Executive Order explicitly excludes federal grants, contracts with Indian Tribes, employees who perform work outside of the United States, contracts equal or less than the simplified acquisition threshold (generally \$250,000), and subcontracts solely for the provision of products.

## **Which Employees are Covered By the Mandate?**

The new contract clause will “apply to any workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument.” The “on or in connection with” standard is borrowed from the [federal contractor minimum wage requirement](#). Employees perform services “on” a contract when they perform the work required by the contract, and perform “in connection with” a federal contract when they perform services that are not required by the contract, but are necessary to the performance of the contract’s services, such as custodial, security, or maintenance services at facilities that perform both commercial and government work. The executive order applies to “any workplace locations . . . in which an individual is working on or in connection” with a contract. On its face, this would apply the vaccine mandate to full-time remote workers who do not interact in-person with any other co-workers.

The Executive Order is ambiguous about several important issues, which will need to be fleshed out by the Task Force’s guidance. First, in the context of the federal contractor minimum wage requirement, employees who work only “in connection with” a contract are not covered unless more than 20% of their work time is spent performing contract-related services. Will the same 20% threshold apply to the vaccine mandate? Second, the Executive Order is phrased to apply to “any workplace locations” where contract work is performed, rather than to employees performing the work. Arguably, the mandate may cover workers performing only commercial work if there is also government contract work performed at the employee’s “workplace location,” which is itself a potentially ambiguous term pending further guidance from the Task Force.

## **What Exemptions are Applicable?**

The Executive Order provides that the Task Force should permit only exceptions “required by applicable law.” Presumably, this would include disability, religious, and pregnancy accommodations that are required by federal statutes. To date, many employers implementing vaccine mandates have struggled with these accommodation requirements, which present complex and nuanced legal issues. To the extent the Task Force’s guidance regarding exemptions is different than generally-applicable federal law, it will only add to the complexity. Moreover, state law may impose different or additional requirements, including laws in some states protecting workers against mandatory vaccine mandates, which may conflict with the mandate required by the Executive Order. To the extent there is ambiguity as to which employees are actually covered by the Executive Order, the potentially conflicting obligations under the Executive Order and state laws may pose challenging dilemmas for employers.

COVID-19 vaccine mandates present complex legal issues for employers, especially when employees claim a right to religious, disability, pregnancy, or other accommodations. Federal contractors should begin working with counsel now to prepare for the new mandate required by the

executive orders, including implementing procedures to communicate with employees regarding the mandate, ascertain employees' vaccination statuses, and process and address requests for accommodations.

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