

COVID-19 Policy Update

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Critical Employer COVID-19 Development: Safer Federal Workforce Safety Guidance and the OSHA Emergency Temporary Standard Update

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Key Points

- The recent announcements around federal contractor requirements for mandatory vaccination and the upcoming OSHA Emergent Temporary Standard have created significant confusion for employers.
- It's important to understand that these are two distinct processes running in parallel that apply differently to employers of varying size and scope of work. Executive Order 14042 requiring vaccination applies to businesses of all sizes servicing federal contracts, while the OSHA ETS applies only to businesses of 100 employees or more and provides a weekly testing option.
- While the OSHA ETS is still pending publication, EO 14042 includes an implementation deadline for full vaccination by December 8, 2021. Given the six weeks required to meet the definition of full vaccination, which means employers only have until the third week of October to initiate compliance with these requirements.
- At this time, potential penalties for non-adherence remain uncertain, but the impact on private industry is expected to be broad and far reaching across the United States.

In-Depth Analysis

On September 9, 2021, President Biden issued an update to his COVID-19 Action Plan that included two Executive Orders, Ensuring Adequate COVID Safety Protocols for Federal Contractors (EO 14042) and Requiring Coronavirus Disease 2019 Vaccination for Federal Employees (EO 14043). Additionally, the update included a directive to the Occupational Safety and Health Administration (OSHA) to develop an Emergent Temporary Standard (ETS) that would require all employers with 100 or more employees to ensure their workforces are fully vaccinated or require unvaccinated workers to produce a negative test result on at least a weekly basis before coming to work.

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Since those orders were issued, however, there have been a number of questions about EO 14042 and the OSHA ETS related to scope, applicability to various parts of the private sector and the timeline for implementation.

Relationship Between OSHA ETS and Executive Order 14042:

For starters, EO 14042 applies to federal contractors and subcontractors while the OSHA ETS specifically applies to private sector entities with 100 or more employees. Importantly, smaller businesses with fewer than 100 employees may not be subject to the OSHA ETS, which has not yet been issued by the U.S. Department of Labor (DOL) as of this date. Many have asked if there are indications about what to expect from the forthcoming ETS? When the announcement was made on September 9, it was noted that the Standard would be published “within a few weeks,” and would be expected to adhere closely to the Safety Protocols for Federal Contractors outlined in EO 14042. The ETS is expected to contain provisions harmonizing the vaccine-or-test mandates with employer obligations to provide reasonable accommodations for disabled employees under the Americans with Disabilities Act (ADA) and for employee religious beliefs pursuant to Title VII of the Civil Rights Act of 1964. Beyond that, many questions remain including whether and how the ETS may apply to remote workers, whether employers will be required to provide testing resources for employees and what additional safety measures employers may be required to implement.

Ensuring Adequate COVID Safety Protocols for Federal Contractors:

EO 14042 directed the [Safer Federal Workforce Task Force](#) to issue “definitions of relevant terms for contractors and subcontractors, [and] explanations of protocols required of contractors and subcontractors to comply with workplace safety guidance” by September 24, 2021. Those definitions, released late last week, outlined who would be subject to the guidelines, timelines, vaccination, masking and physical distancing and implementation requirements. The key points, impressive in scope, are as follows:

- A. “To whom and where does this apply?”
 - a. The guidance applies to all covered contractors defined as “a prime contractor or subcontractor at any tier who is party to a covered contract.”
 - b. Covered contractor employees include “any full time or part-time employee of a covered contractor working on or in a connection with a covered contract or working at a covered contractor workplace”
 - c. Importantly, anyone working “in connection with a covered contract” includes persons performing “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,” which are specifically noted to include but not limited to: human resources, billing and legal review.
 - d. A covered contractor workplace is “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 [and may include shared common areas such as kitchens, elevators, hallways and parking garages]. A covered contract workplace does not include a covered contractor employees’ place of residence.”

B. Vaccination Requirements

- a. The EO specifies that all covered contractor employees, including those working from home, must be fully vaccinated by December 8, 2021, with only limited exceptions to be granted for medical or religious reasons.
- b. Contractors are required to review and verify vaccination documents to ensure compliance but are not required to maintain records of these documents.
- c. Simple attestation of an employee's vaccination compliance will not be acceptable.

C. Masks and Physical Distancing

- a. The EO specifies that **CDC Standards of Community Transmission** should be used to direct masking and distancing activities in the workplace.
 - i. In areas of high or substantial community transmission, everyone, including visitors and fully vaccinated employees, is required to wear masks indoors.
 - ii. In low and moderate transmission areas, fully vaccinated persons are not required to wear a mask.
 - iii. Unvaccinated persons are required to wear a mask at all times regardless of the level of transmission.
 - iv. Fully vaccinated persons are not required to socially distance regardless of community transmission levels, while unvaccinated persons should maintain a distance of six feet to the extent practicable.

D. Timeline and Implementation

- a. Federal agencies are directed to include these requirements on any contract options exercised after October 15, and to include them in any new contracts beginning after November 14, 2021.
- b. The EO specifically notes that the guidance supersedes any state level directive that stands in contradiction to these guidelines.
- c. Contractors are required to designate a specific person or persons to coordinate implementation and ensure compliance.

What's Missing?

It's important to note that these guidelines do not fully address two important considerations.

First, EO 14042 does not directly address the role of booster COVID-19 doses in meeting the need for full vaccination. It defines "fully vaccinated for COVID-19 [as] two weeks after they have received the second dose in a two-dose series, or two weeks after they have received a single-dose vaccine." Currently, the CDC shares that same definition and the Guidelines note that updated guidance will be made in line with any future CDC updates. That may leave some employees and employers with uncertainty about any workplace requirements for a third dose in the near future.

Second, the Executive Order also does not spell out potential penalties around verification and consequences for noncompliance. It notes that agencies are required to include these requirements on any existing contract option exercised after October 15, 2021, or any new contract after November 14, 2021. It further notes that contractors are required to verify compliance internally, but does not provide guidance about any penalties that may be imposed for failure to adhere these terms. The scope of these penalties may include monetary fines, work stoppage, or termination of the contract, but these details are not included in EO 14042.

Impact and Outlook

By broadly defining the applicability of these policies to anyone “not directly engaged in performing the specific work called for by the covered contract,” as well as the “workplace” to include private residences and areas of shared common usage, the Safer Federal Workforce Task Force Guidance creates a scope of broad applicability with far reaching consequences for contractors. Should these rules survive the expected legal challenges, employers servicing federal contracts will likely find themselves in the position of having to implement broad vaccine mandates for their employees to continue working for the federal government.

While it may yet take some time before any legal challenges are settled, these guidelines and definitions also likely give employers a reasonable sense for what to expect from forthcoming OSHA guidance, which will operate in parallel to EO 14042.

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