

LEGAL UPDATES

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UPDATE: Federal Contractor-Specific COVID-19 Workplace Safety Guidance Issued By The Safer Federal Workforce Task Force

There are new developments regarding the federal contractor COVID mandate as of November 10, 2021. The most important is that the deadline for compliance appears to have been pushed back from December 8, 2021 to January 18, 2022.

On September 27, 2021, we published an alert regarding the Safer Federal Workforce Task Force's ("Task Force") Guidance for Federal Contractors and Subcontractors ("Guidance"). The Alert explains and describes the basic compliance requirements for federal contractors and subcontractors. Our November 5 webinar further explained the Guidance and many of the updates to the Guidance and related Frequently Asked Questions ("FAQs").

On November 10, 2021, the Task Force published "updated" Guidance and added new and updated points to its FAQs. The important takeaways are:

The updated Guidance states that "Covered contractor employees must be fully vaccinated no later than January 18, 2022." Contractors and subcontractors are still advised to work in good faith towards compliance at their earliest convenience, with the understanding that the deadline has been pushed back from December 8, 2021 to January 18, 2022 and added lead time may be required to the extent contractors attempt to roll out vaccination initiatives/requirements over the holidays.

A new FAQ was added providing links to signage federal contractors and subcontractors may use at entrances to "covered contractor workplaces": one

for areas of high or substantial levels of community transmission and one for areas of low or moderate levels of community transmission.

An updated FAQ, incorporating updated CDC recommendations on when employees may appropriately delay vaccinations, concludes: “During the period in which vaccination is delayed, a covered contractor employee must follow applicable masking and physical distancing protocols for not fully vaccinated individuals. There may be circumstances in which an agency determines that the nature of a covered contractor employee’s job responsibilities at a Federal workplace, or the location of their work at a Federal workplace, requires heightened safety protocols. In some cases, an agency may determine that the nature of a covered contractor employee’s responsibilities at a Federal workplace are such that no safety protocol other than vaccination is adequate—in that case, covered contractor employees who are not fully vaccinated would be unable to perform the requisite work at the Federal workplace. Such circumstances do not relieve the contractor from meeting all contractual requirements.”

Finally, the Task Force updated its FAQ regarding workplace safety requirements a federal or contractor facilities. The Task Force clarified that its Guidance applies to all covered contractor employees and to all contractor or subcontractor workplace locations and noted that contractors may be required to comply with additional workplace safety requirements imposed by individual federal agencies at specific federal buildings and installations.

The remainder of the Guidance and FAQs appears to be unchanged from the November 1, 2021 updates. Contractors and subcontractors are advised to check the Task Force’s website at least twice a week for “what’s new”—particularly since there have been seven updates in less than two months since the Guidance was first issued on September 24, 2021.

We are tracking several federal lawsuits across the country seeking to invalidate the Guidance. These lawsuits are different from the federal cases challenging the OSHA ETS which, as of this moment, has been stayed by a federal appellate court. The Guidance has not been stayed or enjoined at this time and contractors/subcontractors should continue to comply with the Guidance and all FAQs. We will provide updates once there are decisions of significance from any of the pending lawsuits challenging the Guidance.

There is one other development that unionized federal contractors and subcontractors should be aware of. On November 10, 2021, the National Labor Relations Board issued Memorandum OM 22-03 to all of its Regional Directors concerning an employers’ duty to bargain regarding the OSHA ETS’s

requirements. While the OSHA ETS does not apply to federal contractors and subcontractors already subject to and complying with the Guidance, the NLRB's memorandum regarding an employer's duty to bargain over the effects of contractor compliance with federally mandated COVID workplace safety requirements likely applies with equal force to the Guidance. As a result, federal contractors and subcontractors should carefully consider their bargaining obligations before making workplace safety changes in unionized settings.

Both the Guidance and the future FAR clauses are rapidly evolving. Husch Blackwell will be publishing additional guidance and insights as future developments warrant.

Contact us

Michael Schrier or your regular contact in the firm's Government Contracts or Labor & Employment practice groups are available to answer any questions you may have.

Your comprehensive COVID-19 legal resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.