

CLIENT UPDATE

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SAFER FEDERAL WORKFORCE TASK FORCE GUIDANCE - COVID-19 VACCINATION MANDATE

On September 24, 2021, the Safer Federal Workforce Task Force released its Guidance ("Guidance" - <https://roffmanhorvitz.com/documents/roffman-horvitz-2021-10-draft-contractor-guidance-doc-20210922.pdf>) implementing President Biden's September 9, 2021 COVID-19 Vaccination Executive Order 14042 for federal contractor employers (Executive Order - <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors>).

There still is a lot of uncertainty regarding the implementation of this Guidance – including what certification or attestation will employers have to make, what are the consequences for failing to have a fully vaccinated workforce, whether the guidance will be challenged in court, and whether any legal challenge will delay the implementation deadline – but the following information may help organizations to determine their next steps.

- The Executive Order does not apply to all types of contracts.
 - o It does not apply to contracts for goods.
 - o It does not apply to contracts below the Simplified Acquisition Threshold, which in 2021 is \$250,000.
 - o What does it apply to? "The term contract includes contracts covered by the Service

Contract Act, contracts covered by the Davis-Bacon Act, concessions contracts not otherwise subject to the Service Contract Act, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents or the general public.”

- If your organization previously undertook an effort to determine whether Executive Order 14206, raising the employee minimum wage for federal contractor employees, applies to your organization, and you determined it does apply to your organization, then this COVID-19 vaccination mandate order and Guidance likely applies to your organization, too.
- Does it include subcontractors?
 - o Yes. Subcontractors on the types of contracts covered by the Executive Order and the Guidance are required to comply.
- This obligation to ensure the mandatory vaccine status of all full-time and part-time employees is a creature of contract.
 - o Until the employer has entered into a new or modified contract with a federal agency, which contract contains the COVID-19 vaccination mandate clause, the provisions of this Guidance do not yet apply.
 - o For existing contracts, where performance will be ongoing after October 15, 2021, the federal agency will be required to incorporate the new clause at a point when an option is exercised or an extension is made.
 - o For new solicitations being let out between October 15 and November 14, agencies will include the clause in the solicitation.
 - It is not clear what attestation the contractor will need to make in order to submit a bid versus the attestation of being able to come into compliance if awarded the work.
 - o For new contracts entered into on or after November 14, the contracts will have the vaccination mandate clause in there.
- Covered Contractor employers should prepare now to include a flow-down clause in their master agreement template with covered subcontractors.
 - o Does the prime contractor need to verify that the subcontractor is adhering to the mandate? No, the obligation of the contractor at the higher tier is to flow down the mandate.
- The Guidance defines a “covered contractor workplace” to mean 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. A covered contractor workplace does not include a

covered contractor employee's residence."

- o That definition is important. Although employees who work remotely in their homes will not have to wear masks or observe physical distance protections, the FAQs accompanying the guidance state that employees of a covered contractor who work remotely from home still must be vaccinated if those employees work on a covered contract.
- The employer must designate a person or persons to coordinate implementation of and compliance with this Guidance and the workplace safety protocols required at covered contractor workplaces. These individuals must:
 - o Ensure that information on required COVID-19 workplace safety protocols is provided to covered contractor employees and all other individuals likely to be present at covered contractor workplaces
 - o Communicate the required workplace safety protocols and related policies by email, websites, memoranda or flyers or other means
 - o Post signage at covered contractor workplaces that sets forth the requirements and workplace safety protocols in a readily understandable manner
 - o Ensure that covered contractor employees comply with the showing or provision of proper vaccination documentation.
 - o For employers that currently do not have policies or practices in place that address (a) vaccination proof and deadlines; (b) mask wearing; and (c) accommodation request processes, we encourage you to develop them.
- Covered contractor employees who had a COVID-19 infection still are required to be fully vaccinated by December 8, 2021.
 - o Unvaccinated employees who contracted COVID-19 and who were treated with monoclonal antibodies must wait 90 days before getting a COVID-19 vaccine, according to the latest CDC guidance (<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>)
 - o Employees who currently are infected with COVID-19 are eligible to receive the vaccine once they no longer are contagious, and employers should encourage these employees to speak with their personal physician regarding quarantine, isolation, negative test results, and vaccine timing.
- The Guidance applies to outdoor workplace locations (including, for example, construction sites, national parks, and federal lands)
- The federal Guidance supersedes any contrary state laws.

As additional information is announced, we will circulate additional updates.

If you have any questions about the content in this Client Update, please contact any of the attorneys who contributed content:

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About Roffman Horvitz

Roffman Horvitz, PLC was built from the ground up to provide a best-in-class outside counsel option for federal contractor employers in the areas of OFCCP compliance, affirmative action plan preparation and design, and employment data analytics.



Alissa A. Horvitz

Alissa Horvitz is a Member Attorney in the firm she co-founded with Josh Roffman. Alissa focuses her practice on representing clients in various matters before the OFCCP, preparing for and defending OFCCP audits and onsite visits, responding to OFCCP information requests, and conducting live and in-person training seminars on OFCCP compliance.



Joshua S. Roffman

Joshua Roffman focuses his practice primarily on advising and overseeing the preparation of affirmative action plans, conducting privileged pay equity analyses, and representing clients in various matters before the Office of Federal Contract Compliance Programs (OFCCP) in all six OFCCP regions, preparing for and defending OFCCP audits and onsite visits, responding to OFCCP information requests, evaluating single entity claims, opposing OFCCP jurisdictional claims for companies without government contracts, petitioning OFCCP for separate facility exemptions, evaluating compliance with the Uniform Guidelines on Employee Selection Procedures, and facilitating the identification of Internet applicants per OFCCP regulations.



Nora K.S. Evans

Nora Evans's practice focuses on the preparation and review of affirmative action plans for federal contractors. She also assists clients in compliance reviews and uses regression analysis to evaluate compensation disparities and pay equity.



James M. McCauley

James McCauley is an Associate Attorney with Roffman Horvitz. His primary focus is assisting in the preparation of affirmative action plans for federal government contractors. James's experience includes creation and review of affirmative action plans, preparation of EEO-1 employment data, and analysis of applicant and hire records to address potential claims of hiring disparities.

**Christopher J. Laudenbach**

Christopher Laudenbach is a first-year Associate Attorney at Roffman Horvitz. He assists in the preparation and review of affirmative action plans for federal government contractors.