

# LMCI BULLETIN

## Compliance with Executive Order 14042 Requiring a Fully-Vaccinated Workforce for Federal Contracts

### Executive Summary

This bulletin is designed assist signatory contractors who work as federal contractors or subcontractors (generally, Davis-Bacon work) to comply with the recently issued Executive Order requiring all employees working on, or in connection with, a federal contract, to be fully vaccinated by December 8, 2021. LMCI does not provide legal advice. Therefore, you should consult your own attorneys regarding specific compliance issues.

The Executive Order applies to (a) new federal contracts executed after October 15, 2021, (b) federal contracts that are renewed after that date, or (c) existing federal contracts where the contractor has signed a modification incorporating the mandatory vaccination clause. All prime contractors must bind their subcontractors to comply with the clause.

Our understanding is that many prime contractors are voluntarily agreeing to insert the mandate into existing contracts. Accordingly, if you are currently performing work on a federal contract, we recommend that take immediate steps to comply with vaccine requirements.

#### **The basic requirements of the Executive Order are:**

1. All employees “*working on, or in connection with,*” a federal contract must be fully vaccinated by December 8, 2021.

2. “Fully vaccinated” means two weeks have passed since the second dose of the Pfizer or Moderna vaccinations or the single dose of the Johnson & Johnson vaccination. Therefore, any employee who has not yet begun a two-dose vaccine must receive the J&J vaccination before November 24th to remain continuously eligible for federal work.

3. Work on a federal contract is self-explanatory. What constitutes “work in connection with” a federal contract is less clear. It clearly includes office staff performing administrative, accounting, and management tasks for any federal projects. Also, employees working in the same workplace as employees working on or in connection with federal contracts must be vaccinated. However, it probably does not include employees on private jobsites, provided those employees do not visit covered sites. It would be wise to adopt procedures to ensure non-vaccinated employees do not co-mingle with employees working on or in connection with federal contracts.

4. There are exceptions for employees who hold a sincere religious belief that would preclude being vaccinated, and those who have a medical condition that precludes vaccination. Contractors who receive requests for religious or medical accommodation should seek counsel when responding to such requests.

## **Understanding the Executive Order and Guidance to Date**

On September 9<sup>th</sup>, President Biden signed Executive Order 14042, which directs executive departments and federal agencies to “ensure that parties who contract with the Federal Government provide COVID-19 safeguards in workplaces with individuals working on or in connection with a Federal contract or contract like instrument.”

*Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors* (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidentialactions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federalcontractors/> (herein “*E.O. 14042*”). Executive agencies implement this order by incorporating contract clauses that require primary and subcontractors to follow federal workplace safety standards. See *Safer Federal Workforce Task Force COVID-19 Workplace Safety, Guidance for Federal Contractors and Subcontractors*, September 24, 2021 (herein “*Workplace Guidance*”). Under these standards contractors must have fully-vaccinated workforces on federal contracts (and in facilities where contracted federal work is performed) by December 8, 2021. *Workplace Guidance* at 5. Clauses bind covered contractors to future changes to the Guidance without executing new contracts or contract-like instruments.

**I. Who qualifies as a Covered Employer?**

A covered employer is “[a] prime contractor or subcontractor at any tier who is a party to a contract, or contract like instrument, that includes the clause.” *E.O. 14042* at § 2(a). The clause is to be inserted in all new or extended contracts (such as an exercised option or modification). The Executive Order does not cover the following federal contracts or instruments: “(i) grants; (ii) contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended; (iii) contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold, as that term is defined in section 2.101 of the Federal Acquisition Regulation; (iv) employees who perform work outside the United States or its outlying areas, as those terms are defined in section

2.101 of the Federal Acquisition Regulation; or (v) subcontracts solely for the provision of products.” *E.O. 14042* at § 5(b).

In addition to regularly timed contract extensions or new contract solicitations, agencies can request (and are now actively requesting) contractors to voluntarily accept contract modifications incorporating the clause. A general contractor that accepts this contract modification is required to pass these requirements down to subcontractors, binding those subcontractors to comply with the Workplace Guidance. *Workplace Guidance* at 12.

Covered employers are required to designate an implementation and compliance coordinator (or coordinators) for COVID-19 workplace safety efforts. *Workplace Guidance* at 7-8. Coordinators will disseminate workplace safety information to covered contractor employees “and all other individuals likely to be present at covered contractor workplaces.” *Id.* Coordinators will also ensure compliance with “guidance related to the showing or provision of proper vaccination documentation.” *Id.*

## **II. Who qualifies as a Covered Employee?**

Covered employee “means any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace.” *Workplace Guidance* at 3-4.

### **a. Working “on a covered contract”**

**b.** Employees “[w]orking on a covered contract” is the most straightforward category of covered employee under the executive order and Workplace Guidance. Vaccination requirement extends even if those workers are working remotely, but remote work does not make an employee’s home a

“covered workplace.” *Workplace Guidance* at 11. **Working “in connection with a covered contract”**

“Employees who perform 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, such as human resources, billing, and legal review, perform work in connection with a Federal Government contract.” *Id.* at 13. Additional examples of employees working in connection with a covered contract could include but is also not limited to workers delivering material to multiple sites, at least one of which includes work on a covered federal contract, and supervisors of project managers overseeing work on at least one covered federal contract.

**c. Working at a covered contractor workplace**

Workers who are employed by a contractor but not working on or in connection with a covered contract will still be required to get vaccinated if they work in the same workplace where work on or in connection with a covered contract is performed.

*Workplace Guidance* at 3-4. A covered contractor workplace is broadly construed.

Employers that wish to limit application of workplace guidance requirements will need to affirmatively isolate and assign work to non-federal contract work to ineligible (non-vaccinated) employees. Employers with ineligible employee populations will need to “affirmatively determine that none of its [non-covered] employees ... come into contact with a covered contractor employee during the period of performance of a covered contract.” *Safer Federal Workforce, Federal Contractor FAQ*, <https://www.saferfederalworkforce.gov/faq/contractors/>. Work performed on separate jobsites could meet this requirement, so long as the contractor did not

require or allow workers to meet at a central office or location to perform non-covered work. Requiring non-covered employees to report directly to their non-federal jobsite could meet this requirement. Conducting these separate operations require contractors to affirmatively direct employees that there will be no interactions between covered contractor employees and non-covered contractor employees in any workplace location during the period of performance on a covered contract. Contractors may also need to take steps to record compliance with these directives (such as a visitor sign in or physical security measures that restrict unaccompanied access by non-covered employees to certain federal jobsites).

Nothing in the Workplace Guidance appears to limit a contractor's ability to reassign a fully-vaccinated employee from work on non-covered contract work at a workplace with non-vaccinated employees to work at a covered workplace. An increase in breakthrough infections could make these types of transfers subject to further restriction in future changes to the Workplace Guidance.

### **III. Exceptions**

Broadly, exceptions to the vaccine requirement stem from individual accommodations for employees and exceptions provided by executive agencies within the contracts and contract modifications.

#### **a. Religious and Medical Exceptions**

Employers "may be required to provide an accommodation to covered contractor employees who communicate to the covered contractor that they are not vaccinated against COVID-19 because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance." *Workplace*

*Guidelines* at 5. Because religious and disability accommodations requests require fact specific inquiries and because jurisdictions vary on interpreting requirements, contractors should seek counsel when responding to such requests.

**b. “Mission Critical” Need**

While the Workplace Guidelines indicate an exception for mission-critical need, it appears that such an exception would only be granted under extraordinary circumstances. *Workplace Guidelines* at 5 (“[s]hould a Federal agency have an urgent, mission-critical need for a covered contractor to have covered contractor employees begin work on a covered contract or at a covered workplace before becoming fully vaccinated, the agency head may approve an exception for the covered contractor”). Further, “in the case of such limited exceptions, the covered contractor must ensure these covered contractor employees are fully vaccinated within 60 days of beginning work on a covered contract or at a covered workplace.” *Id.* at 5. Practically, this means that any unvaccinated employee will need to either be immediately vaccinated upon beginning any mission-critical work, due to the timeframe for two dose vaccines or seek a one dose vaccine within four weeks of beginning “urgent, mission-critical” work.

**IV. Vaccination Timeline**

Covered employees are required to be fully-vaccinated no later than December 8, 2021. *Workplace Guidance* at 4. Employees vaccinated with single dose vaccines (Johnson & Johnson) must receive their dose prior to November 24<sup>th</sup> to remain continuously eligible for federal work. Because two dose vaccines (Moderna, Pfizer) require six weeks to complete (approximately four weeks between shots and two weeks after last shot before an individual is considered fully vaccinated), employees who have

not received their first shots by mid-October will not be eligible to work on or in connection with federal contracts after December 8. See *Workplace Guidance* at 3-4.

## **V. Masking and Social Distancing Requirements**

Even with a vaccinated workforce, compliance requires adherence to CDC guidelines on masking and social distancing requirements. “In addition to the guidance set forth below, CDC’s guidance for mask wearing and physical distancing in specific settings, including healthcare, transportation, correctional and detention facilities, and schools, must be followed, as applicable.” *Workplace Guidance* at 6.