

# CLIENT ALERT

## Task Force Issues New FAQs for Contractor Vaccine Requirements

November 1, 2021

On November 1, 2021, the Safer Federal Workforce Task Force (Task Force) issued new Frequently Asked Questions (FAQs) for federal contractors that are subject to Executive Order (EO) No. 14042 on Ensuring Adequate COVID Safety Protocols for Federal Contractors. The new guidance addresses requests for accommodations, applicability to corporate affiliates, and recommendations for enforcement and compliance. As required by the implementing contract clause, covered contractors are required to comply with this new guidance.

**Requests for accommodations:** First, the FAQs state that requests for accommodation do not need to be resolved before a covered contractor employee begins work on a covered contract or at a covered workplace. While requests are pending, these employees must follow workplace safety protocols for employees that are not fully vaccinated as specified in the Task Force Guidance for Federal Contractors and Subcontractors, which Crowell addressed in client alerts on September 24, 2021 and October 6, 2021. On the other hand, for covered employees that are not vaccinated because they received an accommodation from the covered contractor, agencies are entitled to determine which protocols such employees must follow when they enter a federal workplace. Notably, agencies may determine that mandating the vaccine is the only safety measure available. In such cases, covered employees with accommodations would be unable to work at the federal workplace but the contractor would not be relieved from meeting its contractual requirements. Covered contractors could presumably take the same approach for employees that only or occasionally work at a covered contractor workplace. Additionally, covered contractors should notify their contracting officer when one of their employees who works at a federal workplace has received an exception to the requirement to be fully vaccinated.

**Corporate Affiliates:** Second, the FAQs clarify that corporate affiliates of a covered contractor that do not otherwise qualify as covered contractors may be covered by the vaccine mandate if: “(i) either one controls or has the power to control the other; or (ii) a third party controls or has the power to control both.” Indicia of control also include interlocking management or ownership, identity of interests among family members, shared facilities and equipment, or common use of employees. Therefore, employees of a corporate affiliate of a covered contractor working at the covered contractor’s “covered contractor workplace” will be subject to the vaccine mandate. Additionally, a facility that is owned, leased, or otherwise controlled by an affiliate that is not a covered contractor will be considered a “covered contractor workplace” subject to the vaccine mandate where an employee of the affiliated covered contractor working on or in connection with a covered contract is likely to be present during the period of performance.

**Enforcement:** Third, the FAQs state that covered contractors have discretion in deciding the “appropriate means of enforcement” with respect to employees who refuse to be vaccinated and have not been provided an accommodation or do not have a pending request for an accommodation. Contractors may use their usual processes for enforcement described in their employee handbook or collective bargaining agreements. The FAQs also suggest that contractors look to guidance issued to agencies on enforcement, which includes counseling and education for a limited period, followed by additional disciplinary measures as necessary. Under the guidance to agencies, placing non-compliant employees on administrative leave while the

agency is pursuing an adverse action for refusal to be vaccinated should not occur, and removal of employees should occur only after “continued noncompliance.” In addition, the FAQs state that, during the enforcement period, covered contractors must ensure that non-compliant employees follow all workplace safety protocols for individuals who are not fully vaccinated, and agencies may deny entry to a federal workplace to covered employees that refuse to be vaccinated.

**Compliance:** Finally, the FAQs address how agencies should treat covered contractors that have challenges complying with the Task Force guidance. For covered contractors working in good faith to be compliant, contracting officers should work with them to address the challenges. However, contractors that are not taking steps to ensure compliance may be subject to “significant actions,” including termination of the contract. Working in good faith to comply may include, establishing the COVID-19 workplace safety efforts required by the Task Force, communicating the workplace safety requirements with employees, and taking steps to figure out who within the covered workforce is vaccinated and how to bring the unvaccinated employees into compliance.

Crowell & Moring is continuing to monitor fast-moving developments in this area and our team is available to help companies navigate the many issues raised by the EO and Task Force guidance.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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