



## Executive Order 14042 Agency Class Deviation Guidance

Executive Order 14042, issued on September 9, 2021, requires that certain federal contractors and subcontractors mandate vaccinations against COVID-19 for covered employees in addition to requiring compliance by covered employees and visitors with other COVID-19 safety protocols.

However, E.O. 14042 leaves several questions unanswered, including how agencies should implement the order and, in some cases, what types of contracts are covered. Government agencies have begun to issue guidance in the form of class deviations, the substance of which we are providing as a side-by-side comparison.

Crowell & Moring LLP is tracking this emerging guidance, and is pleased to present the table below, current as of October 11, 2021.

	White House	Task Force	GSA	DoD	VA	DHS	NASA	DoJ
Source(s)	<a href="#">E.O. 14042</a> (issued on 09/09/2021; effective immediately)	<a href="#">Guidance</a> (issued on 09/24/2021; no effective date listed)	<a href="#">Class Deviation</a> (issued on 09/30/2021; effective immediately)	<a href="#">Class Deviation</a> (issued on 10/01/2021; effective immediately)	<a href="#">Class Deviation</a> (issued on 10/01/2021; effective immediately)	<a href="#">Class Deviation</a> (issued on 10/01/2021; effective immediately)	<a href="#">Class Deviation</a> (issued on 10/01/2021; effective immediately)	<a href="#">Class Deviation</a> (issued on 10/04/2021; effective immediately)
Expressly Covered Contracts	<ul style="list-style-type: none"> <li>- Procurement contracts or contract-like instruments for services, construction, or a leasehold interest in real property</li> <li>- Contracts or contract-like instruments for services covered</li> </ul>	<ul style="list-style-type: none"> <li>- Contracts with contract clause (FAR 52.223-99; DFARS 252.223-7999)</li> <li>- Contracts with small businesses</li> <li>- Contracts in jurisdictions that seek to prohibit compliance with workplace safety protocols related</li> </ul>	<ul style="list-style-type: none"> <li>- Contracts or contract-like instruments for services, construction, or a leasehold interest in real property exceeding the SAT<sup>3</sup> or the SLAT<sup>4</sup></li> <li>- Contracts or contract-like instruments for</li> </ul>	<ul style="list-style-type: none"> <li>- See E.O.</li> </ul>	<ul style="list-style-type: none"> <li>- Solicitations and contracts for services, including construction</li> </ul>	<ul style="list-style-type: none"> <li>- Solicitations and contracts for services, including construction</li> </ul>	<ul style="list-style-type: none"> <li>- Commercial and non-commercial acquisitions for services, supplies, research and development, construction, and end-items</li> </ul>	<ul style="list-style-type: none"> <li>- Solicitations and contracts for services, including construction</li> </ul>

<sup>3</sup> The simplified acquisition threshold (“SAT”) is currently \$250,000. FAR 2.101. *See also* 2 C.F.R. § 200.88.

<sup>4</sup> Currently, \$250,000. The simplified lease acquisition threshold (“SLAT”) is the simplified acquisition threshold “when applied to the average annual amount of rent for the term of the lease, including option periods and excluding the cost of services.” GSAM 570.102.

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	<p>by the Service Contract Act<sup>1</sup></p> <ul style="list-style-type: none"> <li>- Contracts or contract-like instruments for concessions, including concessions contracts excluded by the Department of Labor regulations<sup>2</sup></li> <li>- Contracts or contract-like instruments entered into with the federal government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public</li> </ul>	<p>to the COVID-19 pandemic</p>	<p>services covered by the SCA</p> <ul style="list-style-type: none"> <li>- Contracts or contract-like instruments for concessions, including concessions contracts excluded by the DoL regulations</li> <li>- Contracts or contract-like instruments entered into with the federal government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public exceeding the SAT</li> <li>- Federal Supply Schedule contracts above the MPT,<sup>5</sup> including contracts that are solely for products</li> <li>- Blanket Purchase</li> </ul>					

<sup>1</sup> 41 U.S.C. § 6704.133(b) *et seq.* [hereinafter “SCA”].

<sup>2</sup> 29 C.F.R. § 4.133(b) [hereinafter “DoL regulations”].

<sup>5</sup> The micro-purchase threshold (“MPT”) is currently \$10,000. FAR 2.101. *See also* 2 C.F.R. § 200.67.

	White House	Task Force	GSA	DoD	VA	DHS	NASA	DoJ
			<p>Agreements for all new and existing orders</p> <ul style="list-style-type: none"> <li>- Government-Wide Acquisition Contracts, Multi-Agency Contracts, and indefinite delivery, indefinite quantity contracts<sup>6</sup></li> <li>- GSA SmartPay master contracts prior to the exercise of option or extension</li> <li>- GSA City Pair Program new contract awards prior to extending existing City Pair contracts</li> <li>- Contracts under GSA's pilot program Commercial Solutions Opening</li> <li>- Tenders of service</li> <li>- Federal Supply Schedule contracts solely for products</li> </ul>					

<sup>6</sup> Indefinite delivery, indefinite quantity contracts (“IDIQs”) are required to include the clause if orders are placed after 10/15/2021.

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<b>Contracts “Strongly Encouraged” to be Covered</b>	<ul style="list-style-type: none"> <li>- Contracts or subcontracts for the manufacturing of products</li> <li>- Contracts or subcontracts with a value below the SAT</li> </ul>	<ul style="list-style-type: none"> <li>- Contracts held by non-covered contractors whose employees work at covered contractor workplaces but do not work on a federal contract, such as contracts and agreements related to the provision of food services, on-site security, or groundskeeping services</li> <li>- Contracts and subcontracts for the manufacturing of products</li> <li>- Contracts and subcontracts below the SAT</li> </ul>	<ul style="list-style-type: none"> <li>- Contracts or subcontracts whose value is equal to or less than the SAT/SLAT</li> <li>- Contracts or subcontracts solely for the manufacturing of products, unless exempted by FAS or PBS guidance</li> <li>- Automotive contractors holding IDIQs</li> <li>- Contracts with Commercial Platform contractors</li> <li>- Bills of lading at or below the SAT</li> </ul>	<ul style="list-style-type: none"> <li>- COs “may insert the deviation clause” into solicitations, contracts, task orders, and delivery orders for the manufacturing of products</li> <li>- Solicitations issued prior to 10/15/2021</li> <li>- Contracts, task orders, or delivery orders awarded before 11/14/2021 from solicitations issued before 10/15/2021</li> <li>- Solicitations, contracts, task orders, and delivery orders at or below SAT and performed within U.S. and outlying areas</li> </ul>	<ul style="list-style-type: none"> <li>- Contracts awarded prior to 11/14/2021 on solicitations issued before 10/15/2021</li> <li>- Contracts and subcontracts below the SAT</li> </ul>	<ul style="list-style-type: none"> <li>- Contracts that will be awarded prior to 11/14/2021 on solicitations issued before 10/15/2021</li> <li>- Contracts and subcontracts below the SAT</li> </ul>		<ul style="list-style-type: none"> <li>- Contracts that will be awarded prior to 11/14/2021 on solicitations issued before 10/15/2021</li> <li>- Contracts and subcontracts below the SAT</li> <li>- Contracts and subcontracts for the manufacturing of products</li> </ul>
<b>Contracts Expressly Excluded</b>	<ul style="list-style-type: none"> <li>- Grants</li> <li>- Contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education</li> </ul>	<ul style="list-style-type: none"> <li>- Subcontracts solely for the provision of products</li> </ul>	<ul style="list-style-type: none"> <li>- Micro-purchases</li> <li>- Site acquisition</li> <li>- Sales or surplus real and personal property</li> <li>- Solicitations and contracts if performance is outside the U.S. (limited to</li> </ul>	<ul style="list-style-type: none"> <li>- Contracts or subcontracts with Indian Tribes under ISDEAA</li> </ul>	<ul style="list-style-type: none"> <li>- Contracts and subcontracts with Indian Tribes under ISDEAA</li> <li>- Solicitations and contracts if performance is outside the U.S.</li> </ul>	<ul style="list-style-type: none"> <li>- Contracts and subcontracts with Indian Tribes under ISDEAA</li> <li>- Solicitations and contracts if performance is outside the U.S.</li> </ul>	<ul style="list-style-type: none"> <li>- Contracts and subcontracts with Indian Tribes under ISDEAA</li> <li>- Solicitations and contracts if performance is outside the U.S.</li> </ul>	<ul style="list-style-type: none"> <li>- Contracts and subcontracts with Indian Tribes under ISDEAA</li> <li>- Solicitations and contracts if performance is outside the U.S.</li> </ul>

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	Assistance Act (ISDEAA) <sup>7</sup> - Contracts or subcontracts whose value is equal to or less than the SAT - Employees who perform work outside the U.S. or its outlying areas - Subcontracts solely for the provision of products		employees who are performing work only outside the U.S.) - Contracts and subcontracts with Indian Tribes under ISDEAA					
<b>Contracts that are Neither Expressly Covered or Excluded</b>	- Mixed contracts for products and services - Research and Research and Development - Software, including SaaS - Other Transaction Agreements for Prototypes - Technology Investment Agreements - Medicare Advantage Contracts	- Mixed contracts for products and services - Research and Research and Development - Software, including SaaS - Other Transaction Agreements for Prototypes - Technology Investment Agreements - Medicare Advantage Contracts	- N/A	- Mixed contracts for products and services - Research and Research and Development - Software, including SaaS - Other Transaction Agreements for prototypes - Technology Investment Agreements	- Mixed contracts for products and services - Research and Research and Development - Software, including SaaS - Other Transaction Agreements for prototypes - Technology Investment Agreements	- Mixed contracts for products and services - Research and Research and Development - Software, including SaaS - Other Transaction Agreements for prototypes - Technology Investment Agreements	- Software, including SaaS - Other Transaction for Prototypes - Technology Investment Agreements	- Mixed contracts for products and services - Research and Research and Development - Software, including SaaS - Other Transaction Agreements for prototypes - Technology Investment Agreements
<b>Method for Incorporating</b>	- Effective immediately, the E.O. applies to	- For contracts awarded prior to 10/15/2021	- For existing contracts, COs shall send a	- When modifying existing	- New contracts awarded on or after 11/14/ 2021	- When modifying existing	- No later than 10/15/2021,	- New contracts awarded on or after 11/14/2021

<sup>7</sup> Pub. L. No. 93-638 (codified at 25 U.S.C. ch. 14, subch. II § 5301 *et seq.*).

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<b>Clause into an Existing Contract</b>	<p>new contracts; new contract-like instruments; new solicitations for contracts or contract-like instruments; extensions or renewals of existing contracts or contract-like instruments; and exercises of options on existing contracts or contract-like instruments where the relevant contract or contract-like instrument will be entered into, the relevant contract or contract-like instrument will be extended or renewed, or the relevant option will be exercised, on or after 10/15/2021</p> <p>- The E.O. applies to extensions or renewals issued or options exercised after 10/15/2021</p> <p>- Where agencies have issued a solicitation before</p>	<p>where performance is ongoing, the requirements must be incorporated at the point at which an option is exercised or an extension is made</p> <p>- For new contracts, the requirements must be incorporated into contracts awarded on or after 11/14/2021</p> <p>- Between 10/15/2021 and 11/14/2021, agencies must include the clause in new solicitations and are encouraged to include the clause in contracts awarded</p>	<p>cover letter and modification request (samples provided) to add the FAR clause</p> <p>- Modification must be bilateral</p> <p>- GSA will use a technology solution to automatically send cover letters and modification requests to contractors for most GSA contracts</p> <p>- For IDIQs, contracting activities may take interim actions if a signed modification is not returned to GSA by 11/14/2021</p>	<p>contracts, task orders, or delivery orders, COs shall use a bilateral modification to incorporate the deviation clause</p> <p>- Solicitations issued on or after 10/15/2021 and contracts, task orders, and delivery orders awarded pursuant to those solicitations, that are expected to exceed the SAT must include the clause</p> <p>- Contracts, task orders, and delivery orders awarded on or after 11/14/2021 from solicitations issued before 10/15/2021, that exceed the SAT must include the clause</p> <p>- Extensions or renewals issued on or after 10/15/2021 of contracts, task orders, and delivery orders that exceed the SAT must</p>	<p>from solicitations issued before 10/15/2021, including new orders under IDIQs issued before 10/15/2021 must include the clause</p> <p>- New solicitations issued on or after 10/15/2021 and contracts awarded pursuant to those solicitations must include the clause</p> <p>- Extensions or renewals of existing contracts and orders awarded on or after 10/15/2021 must include the clause</p> <p>- Options on existing contracts and orders exercised on or after 10/15/2021 must include the clause</p>	<p>contracts, task orders, or delivery orders, COs shall use a bilateral modification to incorporate the deviation clause</p> <p>- New contracts awarded on or after 11/14/2021 from solicitations issued before 10/15/2021 (including new orders under existing IDIQs) must include the clause</p> <p>- New solicitations issued on or after 10/15/2021, and contracts awarded pursuant to those solicitations must include the clause</p> <p>- Extensions or renewals of existing contracts and orders awarded on or after 10/15/2021 must include the clause</p> <p>- Options on existing contracts and orders exercised on or after 10/15/2021</p>	<p>clause to be inserted in:</p> <ul style="list-style-type: none"> <li>o All new solicitations and resulting contracts, orders, blanket purchase agreements, cooperative agreement notices and cooperative agreements above the MPT</li> <li>o All existing contracts, orders, blanket purchase agreements, and cooperative agreements above the SAT</li> <li>o All solicitations above the MPT issued prior to the effective date of the class deviation</li> </ul>	<p>from solicitations issued before 10/15/2021 must include the clause</p> <p>- New solicitations issued on or after 10/15/2021 and contracts awarded pursuant to those solicitations must include the clause</p> <p>- Extensions or renewals of existing contracts and orders awarded on or after 10/15/2021 must include the clause</p>

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	10/15/2021 and have entered into a contract or contract-like instrument resulting from that solicitation within 30 days of 10/15/2021, agencies are strongly encouraged to apply the E.O.			include the clause - All options exercised on or after 10/15/2021 on contracts, task orders, and delivery orders that exceed the SAT must include the clause  - Existing IDIQ contracts that are anticipated to have orders that exceed the SAT and that have an ordering period that extends beyond 10/15/2021 must include the clause		must include the clause		
<b>Subcontracts</b>	- All contracts and contract-like instruments must include a clause that the contractor and any subcontractors, at any tier, shall incorporate into lower-tier subcontracts  - Subcontracts below the SAT are strongly encouraged to include the clause	- The requirements apply to all subcontractors at all tiers, except for subcontracts solely for the provision of products  - Subcontracts at all tiers except for products. Requirement must be flowed down to the prime contractor must flow the clause down to	- The requirements apply to subcontractors at all tiers for covered subcontracts  - Subcontracts below the SAT are strongly encouraged to include the clause  - Subcontracts for the manufacture of products are strongly	- Contractors shall include the clause in subcontracts at any tier that exceed the SAT on the date of award and are for services, including construction, and are performed in whole or in part in the U.S.  - No requirement to flowdown in subcontracts for products	- Contractors shall include the clause in subcontracts at any tier that exceed the SAT on the date of award and are for services, including construction, and are performed in whole or in part in the U.S.  - Subcontracts below the SAT are strongly encouraged to	- Contractors shall include the clause in subcontracts at any tier that exceed the SAT on the date of award and are for services, including construction, and are performed in whole or in part in the U.S.  - Subcontracts below the SAT are strongly encouraged to	- Contractor shall include the clause in subcontracts at any tier that exceed the MPT and performed in whole or in part within the U.S. or its outlying areas.	- Contractors shall include the clause in subcontracts at any tier that exceed the SAT on the date of award and are for services, including construction, and are performed in whole or in part in the U.S.  - Subcontracts below the SAT are strongly encouraged to

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		<p>the next lower-tier subcontractor, to the point at which subcontract requirements are solely for the provision of products</p> <p>- Strongly encourages inserting the clause in subcontracts for the manufacture of products</p>	<p>encouraged to include the clause, unless exempted by FAS or PBS guidance</p>		<p>include the clause</p> <p>- No requirement to flowdown in subcontracts for products</p>	<p>include the clause</p> <p>- No requirement to flowdown in subcontracts for products</p>		<p>include the clause</p>
<b>Other Dates</b>		<p>- All covered employees must be vaccinated by 12/08/2021 (see implementation dates above)</p> <p>- After 12/08/2021, all covered employees must be fully vaccinated by the first day of the performance period on a newly awarded covered contract or at an option exercise/extension/renewal</p>	<p>- All covered employees must be vaccinated by 12/08/2021 (see implementation dates above)</p> <p>- After 12/08/2021, all covered employees must be fully vaccinated by the first day of the performance period on a newly awarded covered contract or at an option exercise/extension/renewal</p>	<p>- All covered employees must be vaccinated by 12/08/2021 (see implementation dates above)</p> <p>- After 12/08/2021, all covered employees must be fully vaccinated by the first day of the performance period on a newly awarded covered contract or at an option exercise/extension/renewal</p>	<p>- All covered employees must be vaccinated by 12/08/2021 (see implementation dates above)</p> <p>- After 12/08/2021, all covered employees must be fully vaccinated by the first day of the performance period on a newly awarded covered contract or at an option exercise/extension/renewal</p>	<p>- All covered employees must be vaccinated by 12/08/2021 (see implementation dates above)</p> <p>- After 12/08/2021, all covered employees must be fully vaccinated by the first day of the performance period on a newly awarded covered contract or at an option exercise/extension/renewal</p>	<p>- All covered employees must be vaccinated by 12/08/2021 (see implementation dates above)</p> <p>- After 12/08/2021, all covered employees must be fully vaccinated by the first day of the performance period on a newly awarded covered contract or at an option exercise/extension/renewal</p>	<p>- All covered employees must be vaccinated by 12/08/2021 (see implementation dates above)</p> <p>- After 12/08/2021, all covered employees must be fully vaccinated by the first day of the performance period on a newly awarded covered contract or at an option exercise/extension/renewal</p>
<b>Other Notes</b>		<p>- No definition of services</p>						



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		<ul style="list-style-type: none"> <li>- No definition of "working on or in connection with"</li> <li>- Remote workers working on or in connection with a covered contract must comply with vaccination requirements</li> <li>- A covered contractor may provide an accommodation to employees who are not vaccinated because of a disability or a sincerely held religious belief, practice, or observance</li> <li>- What accommodations are permissible is not clear</li> <li>- Mission critical extension, if approved by agency head, provides a 60-day extension for vaccination requirement</li> </ul>						