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Federal Contractors Offered Some Flexibility to Implement COVID-19 Vaccine Mandate

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The implementation of President Biden's Executive Order 14042: Ensuring Adequate COVID Safety Protocols for Federal Contractors ("EO") continues to evolve and will likely be refined and updated over the coming weeks and months. In a prior alert, we covered guidance issued by the Safer Federal Workforce Task Force's (the "Task Force") on September 24, 2021 detailing requirements for implementation of the EO.

On November 1, 2021, the Task Force released additional FAQs to clarify its prior guidance. We highlight below some of the key takeaways from the recently released FAQs:

1. Is a 100% vaccination rate required by December 8, 2021?

In what will likely be welcome relief, the FAQs introduced a certain degree of flexibility for covered contractors to comply with the EO's vaccination requirements.

The FAQs instructed agencies to assess the degree to which a covered contractor is taking good faith steps to comply with the EO. When a covered contractor is working in good faith toward enforcing compliance with the EO and workplace safety protocols, the agency "should work with them to address the challenges." However, where the agency determines a contractor is not "taking steps" to comply, the contracting officer should take "significant actions, such as termination of the contract."

The above-referenced "good faith" standard is not further defined in the FAQs. It is likely, however, that an agency will look to the covered contractor's adherence to prior Guidance suggestions, including the establishment of protocols for reviewing employee requests for accommodation and a timeline for employees to become vaccinated, the posting of informational signage at the entrances to workplaces, and adherence with agency-established masking, physical distancing, and testing protocols.

2. How should contractors approach employees who refuse to get the COVID-19 vaccine, and are otherwise not eligible for an exception?

The FAQs addressed a common question faced by many contractors: "How should we treat employees who refuse to get the jab?"

In these situations, the FAQs explain that covered contractors should "determine appropriate means of enforcement" for their own

employees. While this answer provides little definitive guidance, the FAQs also suggest contractors should engage in counseling and education for hold-out employees. Additional disciplinary measures should be reserved “as necessary,” and the FAQs note that removal of an employee should occur only after continued noncompliance.

3. What happens if an employee's request for an accommodation is pending when a covered contractor's work begins?

Finally, the FAQs address how covered contractors should treat employees whose request for a medical or religious accommodation is pending. Once again, the FAQs provide a certain degree of flexibility for these situations.

The FAQs state that covered contractors need not resolve all requests for accommodation or exclude employees from working on covered contracts while requests are pending, so long as the particular employee adheres to the relevant agency workplace safety protocols for their worksite. Covered contractors are advised to inform their contracting officers whenever an employee has received an exception to the requirement to be fully vaccinated.

Additionally, where an employee goes beyond requesting an accommodation and refuses to comply with the EO and/or the agency's workplace safety protocols, an agency may deny that employee entry to the federal workplace entirely.

While the recently released FAQs provide a certain degree of flexibility, covered contractors would do well to remain focused on implementing the requirements of the EO. We will continue to monitor developments relating to the EO, so please stay tuned for future updates.