



OBERMAYER



RED ALERT

UPDATE

**Updates Concerning COVID-19 Safety Protocol Compliance/
Enforcement for Federal Contractors: Accommodations;
Discipline of Unvaccinated Employees; Consequences of
Non-Compliance; Extension of Vaccination Deadline; Interplay
with New OSHA ETS**

Note: COVID-19 Safety Protocol Compliance is extremely fluid right now, and the Federal guidance is being updated constantly. The guidance (and related compliance requirements) discussed herein could change at any time. Though current around the time of publication, we anticipate that things will change in the coming weeks and months. Please consult an attorney regarding current requirements.

If you've been following along, you know that we have been keeping you up to date on the various events surrounding the Government's issuance of COVID Safety Protocols Guidance, and the related FAR Deviation Clauses, for Federal government contractors. If you've missed our previous coverage, check out our blog post on the underlying [Executive Order](#). Then sit down with our [comprehensive client alert](#), which covers not only the Task Force's Guidance (including info on vaccine mandates, masking/distancing requirements, designation of a COVID coordinator, as well as subcontracting issues) but also the key considerations contractors should be keeping in mind in regard to (among other things) modifications and new contracts.

In the past few days, you may have seen coverage with misleading headlines, causing you to believe that the Safer Federal Workforce Task Force's ("the Task Force") September 24 guidance concerning COVID-19 Safety protocols for Federal Contractors ("the Guidance") was rescinded or eliminated. That is not, in fact, the case. However, there have been some important developments, and the nature of those developments is what we address in this alert.



As outlined in our [previous coverage](#), the Guidance was always subject to change, and Contractors are responsible for complying with the newest, updated version of the Guidance. It is critically important for contractors to monitor any such updates, which are for the most part being made through the posting of new Q&A on the [Task Force's website](#). In the interest of keeping you all informed, we have been tracking these updates, too. Since our last client alert was published, there have been several updates that you should all be aware of. Let's take a look at some of the most important issues addressed by these updates, and related government actions.

EMPLOYEES (NOT CLAIMING ACCOMMODATION) WHO REFUSE TO BE VACCINATED:

We have been getting a ton of questions about how to deal with employees who refuse to be vaccinated, so it makes sense to me that the Task Force would have fielded similar inquiries, and added this topic to the Guidance.



As laid out in our previous [client alert](#), according to the September 24 Guidance, "Covered Contractor Employees" on currently "Covered Contracts" (including existing contracts modified to include a COVID Deviation clause) were supposed to be "Fully Vaccinated" (terms in quotes all defined in the client alert) by December 8, 2021. (As explained in further detail below, by way of a November 4 White House statement, the vaccination deadline for covered contractors was extended from December 8 to January 4, 2022. Stay tuned for more on that). After that, Covered Contractor Employees were supposed to be Fully Vaccinated by the first day performing a newly-awarded Covered Contract, or performing an exercised option or extended or renewed contract when the COVID Deviation Clause had been incorporated in. The question that kept arising for contractors is what to do with employees that refuse to be vaccinated by the applicable vaccination deadline? The updated Guidance provides that now addresses that point. The key takeaways are as follows:

- The government is drawing a distinction between (1) those employees who claim exception from the vaccination requirements on the basis of medical or religious accommodation (but perhaps have not yet received an accommodation decision from their employer) and (2) those employees who simply refuse to get vaccinated, but are not citing

religious or medical reasons. The former might have some additional rights (more on that later) while the latter might be disciplined.

- In terms of what “discipline” means, there is no one specific prescribed course of action. **It is up to each individual contractor to figure out how to discipline their non-compliant employees.**

(Remember: Never terminate an employee before discussing the potential risks with your attorney). That said, the Guidance notes that a company’s actions with regard to such discipline should be consistent with company guidance, like handbooks, etc. (which makes having such a handbook, or written policies, crucially important! Get to work drafting policies now).

- Based on this, contractors arguably have some leeway regarding enforcement and do not need to **immediately** terminate employees who are refusing to get vaccinated, or even terminate them prior to the applicable vaccination deadline. Rather, contractors can try a gradual, incremental disciplinary approach, to try and bring about vaccination/compliance. The Guidance refers to the approach being taken by some agencies as an example, stating that this approach “includes... a limited period of counseling and education, followed by additional disciplinary measures if necessary. Removal occurs only after continued noncompliance...[E]mployees [in the process of counseling and education] should not be placed on administrative leave... but will be required to follow safety protocols for employees who are not fully vaccinated when reporting to agency worksites.” In short, contractors will now have some time to try and coax reluctant employees to get vaccinated. This period of leeway will not be indefinite, though. And to be safe, you should probably be able to show that you have begun the first stages of whatever disciplinary process you have selected (if not the actual termination of non-compliant employees) as of your vaccination deadline.

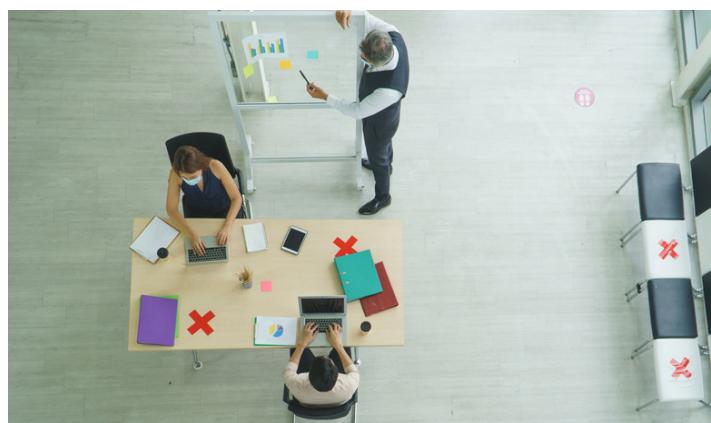
- In the meantime, while the employee remains unvaccinated:

- The unvaccinated individuals need to comply with the other safety protocols relating to distancing and masking.
- An agency may deny the unvaccinated employee entry to a Federal workplace, consistent with the agency’s workplace safety protocols. Note that this could, regardless of compliance concerns, cause performance,

delay, or default issues. It is an interesting question whether this would be considered a delay/change caused by the government, or the fault of the contractor. I am certain that the government would take the latter position.

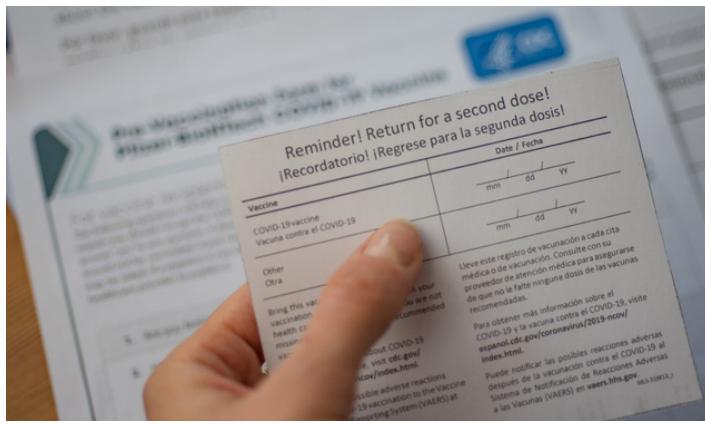
UPDATES ON EMPLOYEES CLAIMING MEDICAL OR RELIGIOUS ACCOMMODATIONS WITH REGARD TO VACCINATION:

As explained in the [client alert](#), covered contractor employees are required to be fully vaccinated unless subject to accommodation. Accommodations may be made for covered employees who indicate that they are not vaccinated because of a disability or medical condition; these requests for “medical



exceptions” or “medical accommodations” should be treated as disability accommodations. Accommodations may also be made for employees with sincerely held religious beliefs, practices, or observances that prevent vaccination. The original Guidance stated that Covered Contractors could determine their own accommodation policies and make the decision whether to extend an accommodation (except in co-employment circumstances, where the Federal government has to concur with proposed accommodations.) The rather nebulous advice has raised many questions from our clients, including (but not limited to) questions about: what is and is not a valid accommodation request (and what constitutes a sincerely held belief); what obligations contractors have to scrutinize the legitimacy of an accommodation request; what process to follow with regard to evaluating accommodation requests; what accommodations may be appropriate, and when; and what to do when accommodation is denied.

Since the time of the client alert, the Guidance was updated to provide some additional direction on contra-indicated medical conditions and pregnancy concerns in relation to medical accommodations, as well as the limited circumstances in which an employer might be able to extend the vaccination deadline for an employee based on medical reasons not rising to the level of a "disability." You can find this guidance in the "Vaccination and Safety Protocols" section of the ["Contractors" page on the Task Force's Guidance website](#), but these considerations are quite fact-specific and to the extent you have questions, you should discuss your individual situation with your attorney.



Very little additional guidance has been provided relating to religious accommodations, and navigating such requests is mostly a matter of a case-by-case analysis, in cooperation with your legal team. Given the minimal guidance, this appears to be an area of great flexibility for contractors, at least so far.

The updated Guidance talks a bit about the timing and mechanics surrounding what to do while an employee's request for accommodation is pending, and what to do if it is denied. First, the updated Guidance clarifies that covered contractors do not need to complete their review of employee accommodation requests before beginning performance. The Guidance explains that: "[t]he covered contractor may still be reviewing requests for accommodation as of the time that covered contractor employees begin work on a covered contract or at a covered workplace." It is clear, therefore, that contractors have some time to ramp up and complete these analyses. What is not clear is how much time. I would guess that some sort of squishy "reasonableness" "good faith" standard will be applied, but we shall see.

In the meantime, while an employee's accommodation request is pending, the contractor must make sure that the unvaccinated employee claiming accommodation observes all workplace safety protocols for individuals who are not fully vaccinated, as laid out in the Guidance (including masking/distancing requirements, etc.). In addition, the Federal government itself will determine the specific protocols that an unvaccinated employee must follow if that employee is on/at a Federal Workspace (i.e. any place, site, installation, building, room, or facility in which any Federal executive department or agency conducts official business, or is within an executive department or agency's jurisdiction, custody, or control) and/or is an "onsite contractor employee". That might mean stricter protocols than laid out in the generally applicable Guidance. In some cases, it might go even further: The agency can determine that no safety protocol other than vaccination is adequate—in that case, covered contractor employees who are not fully vaccinated would be unable to perform the requisite work at the Federal workplace. In other words, the employee won't be able to work and would be denied entry or sent home. In this context, the Guidance specifically states that "[s]uch circumstances do not relieve the contractor from meeting all contractual requirements." This would indicate, to me, that any delay or performance issue arising out of that employee's ability not to work would be considered the contractor's fault (and therefore could result in any of the standard bad-performance-related consequences such as inability to recoup costs, negative CPARS, cure notices, termination, etc.) The updated Guidance also puts the onus on contractors to notify their COs when one of the contractor's employees who works onsite at a Federal workplace has received an exception (presumably either temporarily or permanently) to the vaccination requirement.

With regard to what happens if/when a contractor ultimately denies an employee's request for an accommodation, the Guidance discusses the amount of time that the employee should be given to get vaccinated. Again, the Guidance is fairly vague: "Covered contractors should establish a timeline for a covered contractor employee whose request for an accommodation is denied to promptly become fully vaccinated." Though not explicitly stated in the Guidance, my advice would

be that, like above, this should be done in accordance with a written company policy and handbooks, etc., and should be applied consistently across all employees. Presumably, should an employee fail to become vaccinated in the time allotted, they would then become an “Employee Refusing to Get Vaccinated,” as discussed above.

ENFORCEMENT / CONSEQUENCES OF NON-COMPLIANCE:

Perhaps the most important update relates to the Agency’s ability to enforce these new requirements, and the potential consequences to contractors if they are non-compliant with the Guidance. The updated Guidance states:

“Covered contractors are expected to comply with all requirements set forth in their contract. Where covered contractors are working in good faith and encounter challenges with compliance with COVID-19 workplace safety protocols, the agency contracting officer should work with them to address these challenges. **If a covered contractor is not taking steps to comply, significant actions, such as termination of the contract, should be taken.**”

The good news is that the Government has acknowledged that agencies need to act cooperatively and in good faith to help contractors make their way through these unchartered waters and to help clear obstacles to compliance. The bad news is that the government has decreed that, if you seem indifferent to your compliance requirements, the applicable agency can and **should** take serious measures against you.

CONFLICT WITH STATE LAWS AND STATE LAWSUITS:

One note on a topic that we are getting a lot of questions about. No, the state lawsuits and governor mandates have not, at least as far as the Federal government is concerned, nullified the Guidance in any way. As laid out in the prior [client alert](#), the original Guidance made it clear: The Federal government’s position was that the Guidance constituted Federal law, which superseded all state law to the contrary:

Q: “Does this clause apply in States or localities that seek to prohibit compliance with any of the workplace safety protocols set forth in the [Guidance]?”

A: “Yes. These requirements are promulgated pursuant to Federal law and supersede any contrary State or local law or ordinance.”

Despite the various mandates, state actions, and, now, pending lawsuits, the Federal government **has not walked that back**. In other words, the Federal government’s position on this point has not changed. Clearly, some states disagree with the Federal government’s position, and we will have to wait and see how the various challenges turn out. In the meantime, the Federal government has made it clear that it will hold contractors to the Guidance requirements, regardless of what the contractor’s state is telling them. Now, that does not mean that contractors in states with contradictory laws should just ignore what the state says. It means that those contractors are in a tricky spot — they need to balance the competing risks of non-compliance with Federal law on one hand, with non-compliance with state law, or state law liability to employees, etc., on the other. Contractors in this position need to talk to their legal teams, stat, to develop a plan to avoid and mitigate risk and liability to the maximum extent possible.



EXTENSION OF VACCINATION DEADLINE

On November 4, the White House issued a [statement](#), regarding several vaccination-related policies. The statement was primarily focused on the much-anticipated Department of Labor’s Occupational Safety and Health Administration

("OSHA") rule, [COVID-19 Vaccination and Testing Emergency Temporary Standards \("ETS"\)](#). The ETS requires nearly all private employers with 100+ employees to ensure each of their workers is fully vaccinated, or test for COVID-19 on at least a weekly basis. In addition, the statement informed readers that the Centers for Medicare & Medicaid Services ("CMS") at the Department of Health and Human Services was announcing the details of its own requirement that health care workers at facilities participating in Medicare and Medicaid be fully vaccinated.

The OSHA and CMS rules are separate and apart from the COVID Guidance requirements that Federal contractors must now comply with. But, as regards Federal contractors, the most important part of the statement is the fact that, in an effort to make things consistent across these rules, the government has pushed the vaccination deadline for covered Federal contractors' employees from December 8, 2021 to January 4, 2022. The statement explained:

"The rules released today ensure employers know which requirements apply to which workplaces. Federal contractors may have some workplaces subject to requirements for federal contractors and other workplaces subject to the newly-released COVID-19 Vaccination and Testing ETS. To make it easy for all employers to comply with the requirements, the deadline for the federal contractor vaccination requirement will be aligned with those for the CMS rule and the ETS. Employees falling under the ETS, CMS, or federal contractor rules will need to have their final vaccination dose – either their second dose of Pfizer or Moderna, or single dose of Johnson & Johnson – by January 4, 2022."

INTERPLAY OF OSHA ETS/FEDERAL CONTRACTING GUIDANCE

The other important item in the White House statement concerns the interplay/overlap of the OSHA ETS and the Federal contractor guidance. The statement advised that:

"OSHA is also clarifying that it will not apply its new rule to workplaces covered by ... the federal contractor vaccination requirement."

This means that the ETS will not apply to contractor workplaces that are subject to the September 9 Executive Order and related Guidance (i.e. workplaces where it is likely that employees will perform work on or in connection with a covered contract). But, workplaces not (or not yet) subject to the Executive Order and guidance **will be covered by the ETS**. Thus, it is possible that contractors could have certain workplaces covered by the Federal Contractor guidance, and other workplaces covered by the new ETS rules. It is therefore



important that you familiarize yourself with both sets of requirements, and consult your legal team if you have any questions about what applies where, and what you need to do to comply.

UPDATE NOTE: The day after the ETS was published, several states filed emergency lawsuits in various courts seeking to invalidate the rule. One such court, the United States Court of Appeals for the Fifth Circuit, halted the rule and ordered OSHA to respond by November 8. While OSHA's ETS is paused awaiting the resolution of this matter, it is nonetheless wise for contractors familiarize themselves with the ETS requirements and keep in mind that this lawsuit, and the resulting order, applied to the OSHA ETS, not the Federal Contracting Guidance. We will keep you posted on any new developments.

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SUMMARY AND TAKEAWAYS:

As mentioned above, a number of news outlets have characterized these latest updates as effectively "eliminating" the safety protocol requirements, or indicated that the Guidance vaccine requirements are being "walked back." (There was even a rumor circulating mid-last week that President Biden

made a speech and retracted the Executive Order and Guidance completely, or that compliance requirements had been wholly rescinded.) This is simply not the case.

True, with these new updates, certain allowances are being made: The Vaccination deadline has been extended; Contractors can slow the disciplinary/termination process for employees refusing to get vaccinated; Contractors have more time to finish their accommodation request decisions; Agencies are being told to cooperate with contractors to resolve challenges. These are good developments, and admittedly, they constitute a relaxation from the original Guidance. That said, I think these changes are simply a function of the government realizing what, as a practical matter, is necessary for this whole new scheme of requirements to work at all (and, perhaps, what is necessary to avoid a contractor revolt and a steep drop-off in the number of companies willing to enter Federal contracts!). The updates to the Guidance in no way indicate that the Federal government is abandoning its position on what is required, or is doing away with the vaccine mandate. Nor do the updates indicate that agencies will look the other way for contractors who are not compliant. The Q&A that was added relating to consequences of non-compliance proves as much and should serve as a flashing red warning sign. These new updates are **not**, in my opinion, an attempt to *“nudge nudge, wink wink”* tacitly permit non-compliance, or encourage deception on behalf of Federal contractors. Contractors would be foolish to treat compliance as an insignificant concern or to underestimate the consequences of non-compliance (especially *knowing* non-compliance). The good news is, however, that these updates prove that the Federal government **is** listening to contractor complaints, and is making an effort to improve things by addressing the challenges and criticisms articulated by those contractors. This post has discussed some of the most important recent developments, but there have been others, as well. (This includes, for example, updated Q&A on whether affiliates of Federal contractors need to vaccinate their own employees, and whether contractors need to request proof of vaccination documentation from their employees

when such documentation is otherwise available to the contractor). It is important to review all of these updates and make sure you understand how they apply to you. And of course, keep monitoring [the website](#) for future updates, as well!



As laid out in our [previous coverage](#), contractors should be thinking about several things right now. For primes, this includes how to update their subcontracts (not only to flow down the COVID Deviation clauses, but also to tweak the changes, terminations, default, prosecution of work, and disputes clauses to better prepare for COVID-compliance-related disputes), how to track implementation/compliance costs, how to build such costs into proposals for new contracts, and how to negotiate appropriate reservation-of-rights language in connection with modifications seeking to incorporate COVID Deviation clauses into existing contracts. For subs, you should be thinking about what you are willing to agree to in your subcontracts, how to ensure your prime will sponsor your pass-through claims for implementation/compliance costs, and what remedies you should reserve against the prime if they refuse to, or can't, pass through such claims. You should also be thinking about costs, and how to track them. To the extent that either primes or subs have employees who are requesting accommodations, these contractors should be working through – with legal counsel who is knowledgeable both about government contracts and employment issues – the appropriate steps to take, and documentation to create, in connection with such requests. And of course, with the promulgation of the new OSHA ETS rule, you should be checking in with your legal team to ensure you are compliant on that front, as well. [Obermayer's team](#) is standing by and ready to help. Please do not hesitate to reach out.