Mark Martins Law Office Comment on Developments in Government Contracts—Fall 2021

New Contract Clause Imposes COVID-19 Vaccination Mandate

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On October 1, 2021, the Federal Acquisition Regulatory Council (the "FAR Council") issued a new contract clause that will require contractors to implement certain "workplace safety protocols" against COVID-19 infections. A central requirement of the clause is that contractors must "ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation." The clause defines the term "covered contractor employees" broadly to include all part-time and full-time employees who (i) work on or in connection with a contract that includes the clause ("Contract Personnel"), regardless of where they work; or (ii) at any contractor facility at which any Contract Personnel are likely to be present during the term of the contract. There is no exception for employees who have previously had COVID-19. To comply with the new clause, contractors will have to require covered employees to show proof that they are fully vaccinated, review the proof, and confirm that employees are fully vaccinated. Many contractors are concerned about the significant burdens of the new clause. Many also question how they should implement the "accommodation" (i.e., an exemption) of employees who communicate that they are not vaccinated "because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance." This article aims to help contractors understand these burdens and proposes some common-sense approaches for administration of the accommodations.

Background

The Executive Order

On September 9, 2021, President Biden issued Executive Order No. 14042, *Ensuring Adequate COVID Safety Protocols for Federal*

Contractors (the "Order").[i] The Order requires executive branch agencies to include in their service contracts[ii] a clause that requires contractors and their subcontractors to comply with safety protocols set forth in guidance issued by the Safer Federal Workforce Task Force (the "Task Force"). The Order also specifies that the clause shall apply broadly "to any workplace locations . . . in which an individual is working on or in connection with a Federal Government contract."[iii] The purpose of the Order is to "decrease the spread of COVID-19" and thereby "decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government."[iv] Notably, it does not apply to grants, certain contracts with Indian tribes, contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold[v], contractor employees who work outside the United States or subcontracts solely for the provision of products.[vi]

Task Force Guidance

On September 24, 2021, the Task Force issued the initial guidance anticipated by and referred to in the Order. The initial guidance document, entitled *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (the "Guidance"),[vii] defines the following key terms:

- "Covered contract" means any contract that includes the new clause required by the Order.
- "Covered contractor" means "a prime contractor or subcontractor at any tier who is a party to a covered contract."
- "Covered contractor workplace" means "a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with[viii] a covered contract is likely to be present during the period of performance for a covered contract. A covered contractor workplace does not include a covered contractor employee's residence."

- "Covered contractor 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. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract."[ix]

The Guidance has three main requirements. First, "covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19 by December 8, 2021, unless the employee is legally entitled to an accommodation." Based on the definitions above, this means that contractors must ensure the full vaccination of all employees (i) working on or in connection with a covered contract, regardless of where they work (i.e., Contract Personnel); and (ii) other employees working at any contractor facility at which any Contract Personnel are likely to "be present" during the term of the contract.[x] Thus, the vaccine mandate applies to Contract Personnel working from any location, including:

- Prime contractor facilities;
- Subcontractor facilities;
- Government facilities; and
- Home.

The mandate also applies to non-Contract Personnel working in facilities where Contract Personnel are likely to "be present" for any reason, including:

- Working;
- Attending training;
- Attending meetings;
- Eating;
- Socializing; and

- Exercising.

The Guidance provides that a person is considered "fully vaccinated" two weeks "after they have received the second dose in a two-dose series, or two weeks after they have received a single- dose vaccine."

The only limitation on the otherwise sweeping vaccination mandate is the direction in the Guidance that contractors "may 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."[xi]

The second requirement of the Guidance is that covered contractors must "ensure that all individuals, including covered contractor employees and visitors, comply with published CDC guidance for masking and physical distancing at a covered contractor workplace, as discussed further in this Guidance."[xii]

Third, the Guidance requires covered contractors to "designate a person or persons to coordinate implementation of and compliance with this Guidance and the workplace safety protocols detailed herein at covered contractor workplaces."[xiii]

FAR Council Memorandum and Deviation Clause

On September 30, 2021, to support agencies' immediate compliance with the requirements of the Order, the FAR Council issued a memorandum (the "Memorandum") promulgating new FAR § 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Oct 2021)(Deviation).[xiv] The agencies have subsequently issued FAR deviations under the authority of FAR 1.404, Class Deviations, requiring Contracting Officers to use FAR § 52.223-99 pending completion of rule-making to formally amend the FAR to include the new clause.[xv]

FAR § 52.223-99 has two requirements. First, it provides that:

The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance) at www.saferfederalworkforce.gov/contractors.

As a result, Contractors must treat any text of the Guidance or the frequently asked questions[xvi] posted on the Task Force website as contract requirements. As indicated in the clause, if this guidance changes, contractors will have to comply with the guidance as amended.

The Memorandum also provides that:

> The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.

Further, consistent with the Order, the Memorandum requires agencies to incorporate the new clause into:

- All extensions or renewals, issued on or after October 15, 2021, of existing contracts, task orders, and delivery orders;
- All options exercised, on or after October 15, 2021, of existing contracts, task orders, and delivery orders;
- Solicitations issued on or after October 15, 2021, and contracts, task orders, and delivery orders awarded pursuant to those solicitations;
- Contracts, task orders, and delivery orders, awarded on or after November 14, 2021, from solicitations issued before October 15, 2021.[xvii]

Unfortunately, while the Memorandum provides for this gradual phase-in of the new clause on existing contracts, the Guidance

issued by the Task Force "strongly encourages" agencies to immediately modify existing contracts to include the clause.[xviii] Similarly, while the Order states that it applies only to services contracts and does not apply to contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold,[xix] neither the Memorandum nor the Guidance reminds agencies of these limitations of the Order. Rather, the exclusionary language of the Memorandum provides only as follows:

> Exclusions. The clause shall not be applied to:
>
> - contracts and subcontracts with Indian Tribes under the Indian Self- Determination and Education Assistance Act (the exclusion would not apply to a procurement contract or subcontract under the FAR to an Indian-owned or tribally-owned business entity); or
> - solicitations and contracts if performance is outside the United States or its outlying areas (the exclusion is limited to employees who are performing work only outside the U.S. or its outlying areas).[xx]

Furthermore, the Memorandum actually invites agencies to ignore the limitations of the Order:

To maximize the goal of getting more people vaccinated and decrease the spread of COVID-19, the Task Force strongly encourages agencies to apply the requirements of its guidance broadly, consistent with applicable law, by including the clause in . . . contracts that are not covered or directly addressed by the order because the contract or subcontract is under the simplified acquisition threshold or is a contract or subcontract for the manufacturing of products.[xxi]

Forthcoming Rule-making

As mentioned, FAR § 52.223-99 is a deviation to the FAR that the agencies will use pending the completion of formal rule-making to amend the FAR. The Memorandum states that the FAR Council has opened a case for this rulemaking. Contractors should monitor

developments associated with this rulemaking and be prepared to submit comments to influence the contents of the final clause.

Vaccination Mandate

The first and central requirement of the Order and Guidance is that covered contractors must ensure their employees are fully vaccinated no later than December 8, 2021. For situations in which the mandate becomes applicable to a contractor after December 8th, all employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract.

The Guidance contemplates there may be rare circumstances in which a covered contractor requires an employee to begin work before becoming fully vaccinated. However, approval of the required exception must be made by "the agency head," and the grounds are limited to "urgent, mission-critical need[s] . . . "[xxii] In any event, such employee must become fully vaccinated within 60 days of beginning work on a covered contract or at a covered workplace and, in the meantime, must comply with masking and physical distancing requirements for not fully vaccinated individuals.

A covered contractor "must review its covered employees' documentation to prove vaccination status." In a phrase that could greatly simplify or complicate compliance efforts, depending upon how a firm's implementation efforts are carried out the Guidance directs that "[c]overed contractors must require covered contractor employees to *show or provide* their employer" with proof of full vaccination.[xxiii] If those implementing the vaccination mandate merely inspect the documentation provided—a reasonable interpretation of "show"—the Guidance can be complied with on this point without incurring significant additional burdens. However, if those implementing the vaccination mandate actually collect documentation—one reasonable implication of "provide"—a range of additional obligations and risks could ensue, these stemming from the need to safeguard the private individual health information being created in newly established files of the contractor, in accordance

with applicable federal and state laws.[xxiv]

To minimize the concerns associated with accumulating sensitive personal information of employees, contractors should consider requiring employees to show documentation of vaccination to the responsible persons instead of requiring employees to provide (i.e., furnish a copy of) that documentation. In addition, contractors should decentralize the review of covered employees' documentation perhaps to all first line supervisors. In order for the contractor itself to document compliance with the Guidance, first line supervisors could report—via password- protected email or other secure means—that an individual employee, at a particular date, time, and place, presented one of the four qualifying types of proof, identifying the type inspected by the supervisor:

> [1] original or copy of the record of immunization from a health care provided or pharmacy;
>
> [2] original or copy of the COVID-19 Vaccination Record Card (CDC Form MLS- 319813_r, published on September 3, 2020);
>
> [3] original or copy of medical records documenting the vaccination;
>
> [4] original or copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine.

A central point of contact for the covered contractor, for instance a person in human resources who is designated as the coordinator of COVID-19 workplace safety efforts, should then make corresponding entries in a separately maintained ledger that lists all employees who have showed their supervisors the required proof of vaccination.

Accommodations Generally

While directing that covered contractors must ensure their covered employees are fully vaccinated for COVID-19 by December 8th, the Task Force Guidance includes an exception for the "limited

circumstances where an employee is legally entitled to an accommodation."[xxv] The sole paragraph in the 14-page document dedicated to the accommodation exception offers scant clarification:

A covered contractor 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. A covered contractor should review and consider what, if any, accommodation it must offer. Requests for "medical accommodation" or "medical exceptions" should be treated as requests for a disability accommodation.[xxvi]

One of the "Frequently Asked Questions" included with the Task Force Guidance does further ask, "[w]ho is responsible for determining if a covered contractor employee must be provided an accommodation . . . ."[xxvii] But the furnished answer mostly restates verbatim the foregoing quoted paragraph, with the thin additional gloss that contractors must consider and "disposition[]" accommodation requests regardless of the employee's place of performance and that government agencies defined as "joint employers" for purposes of compliance with the Rehabilitation Act and Title VII of the Civil Rights Act should, along with the covered contractor, review and consider whether and what accommodation must be offered.[xxviii]

In mandating that covered contractors must ensure their covered employees are fully vaccinated and review and disposition accommodation requests, the new clause thus also mandates—without specifying how—that covered contractors establish both a process for reviewing accommodation requests and substantive standards for granting or denying them. Though occasionally touched upon within the FAR and its separate agency supplements, requirements for federal government contractors (like other employers) to accommodate individual disabilities and religious beliefs generally stem from labor and civil rights law rather than procurement law.

For instance, contracting officers and contractors themselves are

familiar with the reasonable accommodations that must be made pursuant to such federal legislation.[xxix]

The substantial body of government rules regarding accommodations found in labor regulations, as well as case decisions of the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB), thus may shed light on how a covered contractor can best develop a straightforward but effective approach to deal with accommodation requests. Guidance on reasonable accommodation of employees' disabilities is contained in 29 C.F.R.

§ 1630.2 and § 1630.9, while guidance on reasonable accommodation of employees' religious practices is in 29 C.F.R. § 1605.1 and §1605.2. To be clear, these sources of guidance do not expressly apply to vaccination mandate accommodation requests; rather, they suggest how authorities—including contracting officers forming and administering contracts, and entities addressing complaints brought by employees or others that an accommodation process is inadequate or unlawful—might reason by analogy when evaluating contractor efforts to comply with the new and untested FAR clause while still controlling costs and preventing hardship that undermines performance.

Accommodations Based Upon Disabilities

Within the substantial body of law that has developed to deal with accommodations under the Rehabilitation Act of 1975, the Americans With Disabilities Act of 1990 (ADA), and related statutes, a disability means "[a] physical or mental impairment that substantially limits one or more of the major life activities of such individual" that is not both "transitory and minor."[xxx] Developing an approach for handling disability-based accommodation requests will require contractors to answer three questions.

First, does the request involve a genuine disability? Under the ADA and implementing rules, physical impairments qualifying as disabilities include "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular,

reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine . . . ."[xxxi] Mental impairments qualifying as disabilities include "[a]ny mental or psychological disorder, such as an intellectual disability (formerly termed 'mental retardation'), organic brain syndrome, emotional or mental illness, and specific learning disabilities."[xxxii]

Meanwhile, the "major life activities" which under the disability definition are substantially limited include "[c]aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working" as well as "[t]he operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions."[xxxiii] Consistent with—but without referring to—these ADA-based definitions, the vaccination mandate in the Task Force Guidance that is incorporated within the new FAR clause recognizes that disabilities include "medical conditions."[xxxiv]

Second, does the contractor have a credible process for reviewing and considering whether to offer a disability-based accommodation? That the Task Force Guidance expressly envisions accommodations will be offered only "in limited circumstances" and that contractors must "review and consider" whether to offer an accommodation at all is strongly cautionary against any process that effectively rubber stamps a request. Instead, the process used should involve some regularized standard operating procedure (SOP) by which a manager with access to professional medical advice offers to privately meet with the employee and at some point personally examines documentation that supports disability-based accommodation requests.

After evaluating whether the cited medical condition or other impairment is a genuine disability, the manager should record in a ledger the date and description of material reviewed and considered but without creating files involving employee information that may be

safeguarded under laws protecting privacy,[xxxv] and sensitive patient health information,[xxxvi] or other applicable laws.[xxxvii] In this way, the covered contractor's diligence in complying with the new FAR clause can later be adequately proven if necessary (using the SOP, the ledger entry, and perhaps an affidavit of the manager attesting that he or she followed the SOP), but without creating large new filing burdens or exposing the contractor to liability, for instance if a cyber-attack upon the contractor's information technology network breaches employee confidentiality.

Third, in the situations in which a genuine disability is found, what is the reasonable accommodation that should be offered?[xxxviii] Though telework arrangements have enabled many firms to continue operations during the COVID-19 pandemic, contractors should avoid automatic resort to a practice of placing accommodated employees on indefinite telework.

An example can illustrate the potential hazards of doing so. Assume that an employee requests a disability-based accommodation and submits a letter from her physician citing medical concerns about the effects of being vaccinated while pregnant in view of a history, reflected in the employee's medical file, of previous mild allergic reactions to other vaccines and injectable therapies.[xxxix] The physician's letter, however, notes that medical concern about vaccination of the employee-patient will be significantly lessened following childbirth. In such a case, a reasonable accommodation could be offered which involves telework until after childbirth and after any parental leave period has ended; accordingly, the granting of an automatic and indefinite exemption from vaccination in such circumstances could subject the covered contractor to questions about its seriousness in complying with the new FAR clause.[xl] Similarly, accommodations beyond telework should also be considered, including flexible hours in the workplace to reduce contacts between unvaccinated employees who have been granted accommodations and others, as well as facilities modifications and barriers and signage, increased physical distancing, mask requirements, and regular testing.

Accommodations Based Upon Sincerely Held Religious Beliefs, Practices, or Observances

Protection of religious freedoms and prevention of discrimination based upon religion are among the purposes of Title VII of the Civil Rights Act of 1964, as amended,[xli] as well as other statutes, such as the Religious Freedom Restoration Act of 1993.[xlii] As with disabilities-based accommodations, developing an approach for handling religious accommodation requests will require contractors to answer three questions.

First, is the request based upon a sincerely held religious belief, practice or observance? In complaints brought to the EEOC which invoke civil rights laws protecting religious freedom, the fact that the religious group to which the individual professes to belong may not accept such belief, or even that no religious group espouses such beliefs, does not determine whether the belief is a sincerely held religious belief of the employee himself or herself. Rather, the prevailing standard is that the belief must be a moral or ethical view of right and wrong and that it must be sincerely held with the strength of traditional religious views.[xliii]

Second, does the contractor have a credible process for reviewing and considering whether to offer a religious accommodation? Again, that the Task Force Guidance expressly envisions accommodations will be offered only “in limited circumstances” and that contractors must “review and consider” whether to offer an accommodation strongly cautions against automatically approving religion-based requests. Instead, the process used must involve some manner of collecting the facts beyond merely accepting the representations of the employee, perhaps by having one member of a religiously diverse internal working group designated for such purpose privately meet and interview the employee about the reasons stated in the request, with a follow- up meeting by the working group to consider the request and the interview responses, and any evidence offered by the employee, such as a letter from a faith leader. The EEOC suggests fourfactors for employers to consider when determining if an employee’s request based upon religion should be granted:

Factors that – either alone or in combination – might undermine an

employee's assertion that he sincerely holds the religious belief at issue include:

> [1] whether the employee has behaved in a manner markedly inconsistent with the professed belief;
>
> [2] whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons;
>
> [3] whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and
>
> [4] whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.[xliv]

Still, the EEOC cautions that "none of these factors is dispositive."[xlv] Prior inconsistent conduct could be persuasively explained as due to changing—but still sincere—beliefs over time. And insincerity should not be assumed simply because some individual practices deviate from those espoused by an organized religious group the employee professes to follow.[xlvi]

Third, in the situations in which a sincerely held religious belief, practice, or observance is found, what is the reasonable accommodation that should be offered? Telework arrangements designed to address individual concerns while enabling continued performance by the contractor are a form of accommodation which leverages a now-widespread means of dealing with the COVID-19 pandemic. But as with disabilities-based situations, different accommodations should also be considered, including flexible hours in the workplace to reduce contacts between unvaccinated employees who have been granted religion-based accommodations and other persons, as well as increased physical distancing, facilities modifications and barriers and signage, mask requirements, and regular testing.[xlvii] Covered contractors should also be prepared for situations in which employees exempted from vaccination due to a religion-based accommodation also seek exemption from mask requirements on religious grounds.

Potential Court Challenges Based Upon Constitutional Issues?

Some will question whether the vaccine mandate in the new FAR clause is subject to challenge in court on constitutional grounds. Although it is risky to anticipate the outcome of any lawsuit without knowing specific facts that might influence judicial reasoning, one precedent will likely be analyzed by any court that eventually hears a challenge to government requirements mandating vaccination. That case is the Supreme Court's 1905 decision in *Jacobson v. Massachusetts*.[xlviii] Pastor Henning Jacobson refused to be vaccinated for smallpox during a smallpox outbreak. The state of Massachusetts had enacted a law empowering boards of health of cities and towns to "require and enforce the vaccination . . . of all the inhabitants thereof" if "in its opinion, it is necessary for the public health and safety . . . ."[xlix] The Board of Health of the city of Cambridge duly adopted a regulation which pronounced it "necessary for the speedy extermination of the disease that all persons . . . should be vaccinated," and that it was "the opinion of the board [that] the public health and safety" required same.[l]

Jacobson was prosecuted for his refusal to be vaccinated. When the case reached the United States Supreme Court, a 7-2 majority of the Court ruled that the smallpox vaccination requirement was constitutional. The justices reasoned that government is instituted for the "common good" and thus "for the protection, safety, prosperity, and happiness of the people . . . ." In a situation where smallpox was "prevalent and increasing in Cambridge, the court would usurp the functions of another branch of government if it adjudged, as a matter of law, that the mode adopted under the sanction of the State, to protect the people at large was arbitrary and not justified by the necessities of the case." The Supreme Court acknowledged that there could be situations in which an authority might exercise its power to protect the community "in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons." But Jacobson's case was not such a situation. The vaccination mandate was upheld.

Astute observers will point out that there are differences between the Cambridge regulation and the new FAR clause. The former was an

action of the state of Massachusetts and not an action of the federal government, which under the Constitution is a government of limited, enumerated powers, with the remainder of the powers reserved to the states or to individual persons. Also, the Supreme Court in Jacobson relied upon the fact that smallpox in Cambridge at the time Jacobson refused vaccination was "prevalent and increasing," while COVID-19 may not fit that description when the hypothetical challenge to the new FAR clause reaches court.

Still, it is difficult to envision the new FAR clause being struck down as unconstitutional absent circumstances in which its application is arbitrary and capricious. Since 1905, the power of the federal government has greatly expanded, with major new areas of federal action and enforcement repeatedly upheld by the Supreme Court.[li] Since *Jacobson*, and despite a vigorous anti-vaccine movement in America that was triggered in its wake, later Supreme Court decisions affirmed *Jacobson*.[lii] Also, any challenge to the new FAR clause will occur in an environment in which most citizens accept the efficacy of approved vaccines, even though anxieties persist regarding the expansion of government and the potential invasion of medicine and science into once-private zones of individual and family life. Moreover, it is not inherently unreasonable for governmental officials to strive to vaccinate as close to 100 percent of the population as possible provided that the government fully respects the rights of employees to request reasonable accommodations based on medical conditions and religious belief. This is because herd immunity benefits the entire population, but cannot be achieved if more than a small fraction remains unvaccinated or otherwise subject to infection.[liii]

Masking and Physical Distancing

In addition to mandating vaccination, the Task Force Guidance imposes masking and physical distancing requirements in covered contractor workplaces. Specifically, covered contractors "must ensure that all individuals, including covered contractor employees and visitors, comply with published [U.S. Centers for Disease Control (CDC)] guidance for masking and physical distancing at a covered contractor workplace . . . ."[liv] After stating this requirement, The Task Force Guidance proceeds to recapitulate a page and a half of CDC

workplace guidance. In addition, and while only incorporating by reference the applicable CDC guidance for such settings, the Task Force Guidance directs that "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."[lv]

As for covered contractor workplaces, the masking and physical distancing rules for fully vaccinated persons, and by extension covered contractors who must enforce those rules, are relatively unburdensome. Those who are fully vaccinated must wear masks in indoor settings "[i]n areas of high or substantial community transmission . . . ."[lvi] But "[i]n areas of low or moderate community transmission[,]" fully vaccinated persons need not wear masks.[lvii] Fully vaccinated persons also need not physically distance themselves from others regardless of the level of community transmission.

The rules for those not fully vaccinated are more burdensome, a fact which complicates covered contractor efforts to offer accommodations based upon disability or sincerely held religious beliefs. Persons not fully vaccinated must wear a mask indoors and in certain outdoor settings regardless of the level of community transmission. Meanwhile, they should remain at least six feet from others at all times.[lviii]

Under CDC guidelines, and thus under the new FAR clause, covered contractors must require that masks be worn consistently and correctly, over mouth and nose. They must also be prepared to review and consider requests for employee accommodations as to mask wear based upon disability or medical grounds. There are also exceptions to mask wearing and physical distancing that covered contractors are authorized to grant. These include when an individual is alone in an office with floor to ceiling walls and a closed door, when eating and drinking and maintaining appropriate distancing (for a limited time), when a mask could get wet due to required work activity, when employees are engaged in high intensity activities that would create breathing difficulties if masks were to be worn, and other activities in which wearing a mask could create a risk to workplace health, safety, or job duty. Such exceptions must be

approved in writing by a duly authorized representative of the covered contractor. The guidelines also authorize the lowering of masks briefly for identification purposes in compliance with safety and security requirements.[lix]

Designation of Responsible Person

The new clause incorporates requirements in the Guidance under which contractors must "designate a person or persons to coordinate implementation of and compliance" with the Guidance at covered contractor workplaces (the "Responsible Persons"). Ideally, the Responsible Persons would be the same individual(s) who are currently responsible for implementing required COVID-19 workplace safety protocols. The clause also adopts requirements in the Guidance concerning the duties of the Responsible Persons. In particular, these individuals must:

- Communicate the protocols and related policies "by email, websites, memoranda, flyers, or other means and posting signage at covered contractor workplaces that sets forth the requirements and workplace safety protocols in this Guidance in a readily understandable manner";

- Ensure that this information "is provided to covered contractor employees and all other individuals likely to be present at covered contractor workplaces";

- Ensure that covered contractor employees comply with the requirements in this guidance related to the showing or provision of proper vaccination documentation."[lx]

The Responsible Persons should be individuals with an understanding of the rules, tact, sensitivity and a demonstrated commitment to respect of employee privacy. Some employees may understandably have some trepidation about showing sensitive personal information to another employee so that their employer can comply with the clause. As discussed above, if this information is negligently or recklessly released or an accommodation request is carelessly dismissed, the employee may be tempted to file suit against the contractor.

Flow-Down to Subcontracts

The requirements of the new clause concerning flow-down of the clause to subcontracts are straightforward: The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts at any tier that exceed the simplified acquisition threshold, as defined in Federal Acquisition Regulation 2.101 on the date of subcontract award, and are for services, including construction, performed in whole or in part within the United States or its outlying areas.[lxi] Thus, despite the Contracting Officers' discretion under the FAR Council's Memorandum to incorporate the clause in prime contracts for products, the clause provides that prime contractors only have to flow-down the clause to subcontracts for services.

In the early days of implementation of the new clause, many questions are arising concerning this flow-down requirement. One question concerns *when* the prime contractors must modify existing subcontracts to include the clause. Thankfully, the response to FAQ No. 21 in the Guidance includes the following clarification:

The prime contractor is responsible for ensuring that the required clause is incorporated into its first-tier subcontracts in accordance with the implementation schedule set forth in section 6 of the order.

As mentioned above, the implementation schedule of the Order requires agencies to incorporate the new clause into all extensions or renewals, issued on or after October 15, 2021, of existing contracts, task orders, and delivery orders. Thus, prime contractors do not have to immediately modify all existing subcontracts to include the clause. Rather, they can defer the modification until the subcontract is extended or renewed.

Another question concerns how to value existing subcontracts to determine whether they are at or below the simplified acquisition threshold of $250,000 and, therefore, exempt from the flow- down requirement at the time of extension or renewal. In particular, for purposes of this determination, is the subcontract value equal to the total value as modified to include the renewal or extension period or is it equal only to the value of the extension or renewal period? For

example, if the total value as modified is $500,000 but the value of the extension or renewal period is only $200,000, does the prime contractor have to include the clause? While there is no clear guidance on this question, since the implementation schedule of the Order requires agencies to modify prime contracts upon extension or renewal without regard to the value of the extension or renewal period, it seems the best answer for prime contractors is to modify the subcontracts if the total value as modified exceeds $250,000.

Yet another question concerns flow-down of the clause to subcontracts with entities located in Texas or other states with rules that prohibit companies from agreeing to vaccination mandates. For example, under an Executive Order issued by the Texas Governor on October 11th (the "Texas Order"), "no entity in Texas can compel receipt of a COVID-19 vaccination by any individual, including an employee or consumer, who objects to such vaccination for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19."[lxii] Clearly, the accommodations in the Texas Order are far broader than the accommodations permitted by the Guidance that has been adopted in FAR § 52.223-99. In particular, whereas the Texas Order requires companies to accept any objection to vaccination for reasons of personal conscience or because the individual previously had COVID-19 (and has the antibodies), FAR § 52.223-99 does not permit contractors to accept these reasons. Thus, under FAR § 52.223-99, the Texas based contractor would have to mandate the employee to take the vaccine or face dismissal from the company. However, under the Texas Order, the contractor could not do so.

If this dilemma arises because the agency has exercised its discretion to add the clause to an existing prime contract prior to the extension or renewal of the contract, then the obvious solution is for the contractor to request that the Contracting Officer use his/her discretion to defer adding the clause. Otherwise, if the Texas subcontractor is key to performance, the program could face unacceptable delays. However, if the Memorandum clearly requires inclusion of the clause into the prime contract, there is no good solution to this dilemma. Companies will simply have to refer the matter to their legal counsel and then to their Contracting Officers for

analysis and resolution

Cost Recovery

Contractors should develop a strategy for recovering the costs of compliance with the new clause. The first step in developing the strategy is to work with company accounting personnel to develop methods for identifying and segregating these costs in the accounting system as they are incurred. The second step is to confer with government contracts accounting and legal experts concerning the contractor's entitlement to recover these costs on existing contracts that have been modified to include the clause. The entitlement will depend on a number of factors, including whether the contracts are cost-reimbursement or fixed price and the specific terms of those contracts. The third step is to submit requests for equitable adjustments of the prices of these contracts. The fourth step is to confer with personnel responsible for pricing new contracts to ensure that the pricing includes each contract's allocable share of the costs of compliance.

Conclusion

Contractors that fail to comply with the requirements of the new clause may face significant adverse consequences. For example, an agency could terminate contracts for default, leaving the contractor with a poor performance record that could damage its chances of winning future contracts. In addition, if the failure to comply is willful, agencies could even make an example of the contractor and suspend and/or "debar" it from receiving future contracts from the federal government[lxiii]. Therefore, it behooves contractors to promulgate and implement a common- sense standard operating procedure ("SOP") for complying with the requirements of the new clause. As discussed above, the SOP must have three main elements. First, the SOP must require the contractor to ensure that all covered contractor employees are fully vaccinated for COVID-19 by December 8, 2021, unless the employee is legally entitled to an accommodation. In connection with this, the SOP should include a decentralized process for reviewing and dispositioning accommodation requests that minimizes the company's risks associated with gathering sensitive health information from employees. Second, the SOP must require

contractor employees to comply with published CDC guidance for masking and physical distancing at a covered contractor workplace. Third, the SOP must designate Responsible Persons to coordinate implementation of and compliance with the clause. In addition to these requirements, contractors must flow down the new clause to covered subcontracts. Finally, contractors should develop strategies for recovering the costs of compliance with the new clause under existing contracts that are modified to include the clause and under new contracts that are subject to the clause.

The foregoing comment was prepared for the general information of clients and other friends of the Mark Martins Law Office PLLC. They are not meant as legal advice with respect to any specific matter and should not be acted upon without counsel from an attorney. If you have any questions or require any further information regarding these or other related matters, please contact us. This material is considered Attorney Advertising.

Endnotes

[i] Exec. Order No. 14042, §1, 86 Fed. Reg. 50985 (September 9, 2021) (hereinafter "Order"). [ii] See Sections 2(e) and 5 of the Order for detailed applicability guidance. [iii] *Id*. at §2. [iv] *Id*. at §1.

[v] The threshold is currently $250,000 for most acquisitions. See Federal Acquisition Regulation ("FAR") §2.101. [vi] *Id*. at §5(b).

[vii] Safer Federal Workforce Task Force, COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (Sept. 24, 2021) (hereinafter "Guidance") available at https://www.saferfederal workforce.gov/downloads/Draft%20contractor%20guidance%20doc20210922.pdf (accessed Oct. 26, 2021).

[viii] The Guidance includes an appendix that answers a set of frequently asked questions ("FAQs"). FAQ No. 17 defines "work in connection with" a covered contract as follows: "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."

[ix] Guidance at 3-4. [x] *Id.* at §1 [xi] *Id*. [xii] *Id*. at §2.

[xiii] *Id*. at §3.

[xiv] FAR Council, Issuance of Agency Deviations to Implement Executive Order 14042 (September 30, 2021) (hereinafter "Memorandum"), available at https://www.whitehouse.gov/wpcontent/uploads/ 2021/09/FAR-Council-

Guidance-on-Agency- Issuance-of-Deviations-to-Implement-EO-14042.pdf (accessed Oct. 26, 2021).

[xv] *See e.g.*, Craig Smith & Eric Leonard, Federal Agencies Roll-Out Class Deviations for Contractor Vaccination Requirements (Oct. 6, 2021) (website of Wiley Rein LLP), available at https://www.wiley.law/alert-Federal-Agencies-Roll-Out-Class-Deviations- for-Contractor-Vaccination-Requirements (accessed Oct. 26, 2021).

[xvi] The Guidance document includes certain FAQs. However, the website includes a broader set of FAQs that the Task Force is and will be updating. According to the clause, contractors must comply with both the FAQs in the Guidance and the FAQs on the website.

[xvii] Memorandum, at § 1, p. 2.

[xviii] *Id.* at § 1, p.3.

[xix] Order, 86 Fed. Reg. at 50987.

[xx] *Id*.at§2,p.3.

[xxi] *Id*. at § 12, p. 3. The Guidance also encourages agencies to incorporate the new clause "into existing contracts and contract- like instruments prior to the date upon which the order requires inclusion of the clause."

[xxii] Guidance at 5.

[xxiii] *Id.* (emphasis added).

[xxiv] The personally identifying and private information on the COVID-19 Vaccination Record Card is typically modest and could be protected with minimal effort. For instance, unique patient number information could be redacted if a copy were to be retained by the contractor to demonstrate compliance with the new FAR clause. However, the approach recommended in this article avoids the creation of new files as much as possible and beginning with the first line supervisor's action to examine proof of vaccination, as such action can be expected, in some instances, to move rapidly to personalized discussions of accommodations. These follow-on discussions will readily extend into much sensitive personal and health information, and contractors should establish procedures that curb tendencies to gather such information in company files from the start. See generally below at notes xxxv, xxxvi, and xxxvii, and accompanying text.

[xxv] *Id.*

[xxvi] *Id.*

[xxvii] *Id.* at 9 (Question 4).

[xxviii] *Id.* at 9-10 (Answer 4) (incorporating without specific citation the Rehabilitation Act of 1975, Pub. L. 93-112, 87 Stat. 355, codified as amended at 29 U.S.C. § 701 et seq., and Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, codified as amended at 42 U.S.C. § 2000e et seq.). A "joint employer" is one that "shares or codetermines the employees' essential terms and conditions of employment" with a separate employer. 29 C.F.R. § 103.40. This, in turn, is an inquiry into whether there is "possess[ion] and exercise [of] such substantial direct and immediate control over one or more essential terms or conditions of employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees." *Id.* Because services may be acquired under a government procurement contract only so long as an employer-employee relationship is not established between the government and the persons performing the services, *Sunbelt Props., Inc.*, Comp. Gen. Dec. B-249469, 92-2 CPD ¶ 353, situations in which an agency is a "joint employer" of a contractor's employees are rare and generally inadvertent. *Cf. DiDonato v. Dep't of the Navy*, EEOC Appeal No. 0120121705 (Aug. 6, 2012) (holding that the Navy exercised sufficient control over complainant private contractor employee's position to qualify as a joint employer for purposes of the Equal Employment Opportunity complaint process).

[xxix] *See, e.g.,* FAR § 22.1301 (defining a qualified disabled veteran as "a disabled veteran who has the ability to perform the essential functions of the employment positions with or without reasonable accommodation"). Subpart 22.13 of the FAR protects equal opportunity for veterans and implements portions of U.S. Code, Title 38, Chapter 42 regarding the employment and training of veterans. *But see* John Cibinic, Ralph C. Nash & Christopher R. Yukins, Formation of Government Contracts (4th ed. 2011) (noting that the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. "is implemented in 29 U.S.C. 1630" but "is not covered in the FAR . . . .").

[xxx] 29 C.F.R. § 1630.2(g)(1). [xxxi] 29 C.F.R. § 1630.2(h)(1). [xxxii] 29 C.F.R. § 1630.2(h)(2). [xxxiii] 29 C.F.R. § 1630.2(i). [xxxiv] Task Force Guidance at 5.

[xxxv] The Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896 (Dec. 31,1974) (codified as amended at 5 U.S.C. § 552a), governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies. It does not by its terms automatically govern the collection of information about individuals undertaken by federal contractors, though contractors designing, developing, or operating systems of records on individuals to accomplish agency functions routinely are required by a standard clause to comply with Privacy Act requirements, *see* FAR § 52.224-2, and undergo privacy training, *see* FAR § 52-224-3. Even when the contract at issue does not involve agency records regarding individuals, however, it is risky for a contractor to fail provide its own employees the most commonplace protections of personal information made prevalent throughout government since

passage of the Privacy Act and the onset of electronic files, the internet, information clouds, and the like. This is because invasion of privacy remains subject to common law tort liability, albeit to a standard that is challenging for a plaintiff to prove. *See, e.g., Restatement (Second) of Torts* § 652H (Am. Law Inst. 1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

[xxxvi] The Health Insurance Portability and Accountability Act, Pub. L. 104-191, 110 Stat. 1936 (Aug. 21, 1996) (HIPAA) (privacy rule codified at 42 U.S.C. §1320a-7c, § 1395ddd, and § 1395b-5), required the establishment of national standards to protect sensitive patient health information from being disclosed without the patient's consent or knowledge. The HIPAA privacy rule does not by its terms govern federal contractors unless they happen to be covered entities, i.e., healthcare providers, health insurers, healthcare clearinghouses, and businesses associates who use or disclose individually identifiable health information to perform or provide services for covered entities. As with information protected by the Privacy Act, however, it is risky for a contractor to fail provide its own employees the most commonplace protections of patient health information made prevalent throughout the healthcare community since passage of HIPAA, one of which happens to be a limitation on disclosure of sensitive patient health information to employers.

[xxxvii] *See, e.g.*, California Civil Code § 56.20 (requiring employers who receive medical information to establish appropriate procedures to ensure confidentiality and protection from unauthorized use and disclosure), § 56.35 (providing remedies for improper use or disclosure of private health information).

[xxxviii] The regulations implementing the ADA contain a definition of "reasonable accommodation":

> (1) The term reasonable accommodation means:
>
> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
>
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. . . .

29 C.F.R. § 1630.2(o). The Guidance does not specifically require a "reasonable" accommodation. However, since the Guidance is consistent with the ADA, it is appropriate for contractors to use the ADA's "reasonableness" standard to determine the type of accommodation that is required in any circumstance. Furthermore, the offering of an unreasonable accommodation could lead to a violation of the ADA.

[xxxix] *See, e.g.*, United States Centers for Disease Control and Prevention, "COVID-19 Vaccines While Pregnant or Breastfeeding" (Oct. 7, 2021), available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/pregnancy.html (accessed Oct. 14, 2021) (noting that among the key considerations pregnant patients should discuss with healthcare providers are "[t]he unknown risks of developing a severe allergic reaction" and "[t]he benefits of vaccination"). Note how this example fits the disability definition cited above in that it involves a "condition . . . affecting one or more body systems, such as . . . reproductive, . . . [and] immune . . . ," 29 C.F.R. § 1630.2(h)(1), and limits "[t]he operation of a major bodily function, including functions of the immune system . . . and reproductive functions." 29 C.F.R. § 1630.2(i).

[xl] Drawing upon equal employment opportunity law, and specifically the regulations implementing the ADA, the process of arriving at a reasonable accommodation, as with the process for determining whether a genuine disability exists, should be relatively "informal," but also "individual[ized]" and "interactive" rather than automatic. *See* 29 C.F.R. § 1630.2(o)(3).

[xli] Pub. L. 88-352, 78 Stat. 241, codified as amended at 42 U.S.C. § 2000e et seq.

[xlii] Pub. L. 103–141, §1, Nov. 16, 1993, 107 Stat. 1488, codified at 42 U.S.C. §§ 2000bb to 2000bb-2.

[xliii] *See United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *see also* EEOC Decision No. 76-104 (1976), CCH ¶ 6500; EEOC Decision No. 71-2620 (1971), CCH ¶ 6283; EEOC Decision No. 71-779 (1970), CCH ¶ 6180. *See generally* 29 U.S.C. § 1605.1.

[xliv] U.S. Equal Employment Opportunity Commission, "Questions and Answers: Religious Discrimination in the Workplace," (Jul. 22, 2008), available at https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace (accessed Oct. 14, 2021).

[xlv] *Id.*

[xlvi] *Id.*

[xlvii] 29 U.S.C. § 1605.2. [xlviii] 197 U.S. 11 (1905). [xlix] *Id.* at 12. [l] *Id.*

[li] *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding Congress's power under the Agricultural Adjustment Act and the Interstate Commerce Clause to impose a quota on wheat grown by a farmer for his personal consumption); *but see United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act because possession of a gun in a school zone was not an activity that could substantially affect interstate commerce).

[lii] *See, e.g.*, *Zucht v. King*, 260 U.S. 174 (1922) (upholding Texas ordinance barring school enrollment absent proof of vaccination).

[liii] *See generally* Note: Toward a Twenty-First-Century Jacobson v. Massachusetts, 121 Harv. L. Rev. 1820, 1822 (2008)("The upshot of herd immunity is that, to protect everybody in a community, a significant percentage of the population—but not everybody—must be vaccinated. That is why, to ward off infectious diseases, it is sensible for public health officials to strive for vaccination rates as close to one hundred percent of the population as is practicable.").

[liv] Task Force Guidance at 6. [lv] *Id.* [lvi] *Id.*

[lvii] The CDC COVID-19 Data Tracker County View website must be consulted by covered contractors to determine whether a workplace is in an area of high/substantial or low/moderate community transmission. If the level of transmission jumps, covered contractors must put in place more protective workplace safety protocols. If the level drops, the level must remain at that lower level for at least two consecutive weeks before the covered contractor utilizes the corresponding protocols for the low/moderate area. Task Force Guidance at 7.

[lviii] *Id.* at 6.

[lix] *Id.* at 7.

[lx] Guidance at §1 [lxi] FAR § 52.223-99(d).

[lxii] See https://gov.texas.gov/uploads/files/press/EO-GA-40_prohibiting_vaccine_mandates_legislative_action_IMAGE_10-11- 2021.pdf (accessed October 27, 2021).

[lxiii] See FAR 9.406-2(b)(1)(i)(A).