



OBERMAYER



# RED ALERT

## **COVID Protocol Compliance Guidance For Federal Contractors: Mandated Vaccines, Masking/Distancing Requirements and Required COVID Coordinators; How to Respond to COVID Deviation Clause Modifications & Amendments**

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.

As readers may remember from our previous [blog post](#), on September 9, President Biden issued an Executive Order (“the Order”) pertaining to mandated COVID-19 Safety Protocols for Federal Contractors and Subcontractors. The purpose of the Order was to ensure that all covered Federal contracts, subcontracts, and contract-like instruments would include a clause (“the Clause”), which would require contractors to comply with the (at that time forthcoming, but now published) COVID-19 guidance issued by the Safer Federal Workforce Task Force (“the Task Force”). The Order required the Task Force to issue the COVID-19 guidance by September 24, 2021.

In keeping with the Order, on September 24, 2021, the Task Force published its [Federal Contractor Guidance \(“the Guidance”\)](#). The Office of Management and Budget [approved](#) the Guidance on the same day. On September 30, 2021, the FAR Council issued [Deviation Clause 52.223-99](#) (“the FAR Deviation,” in effect, the codification of the Clause contemplated by the Order and the Guidance) for incorporation into Federal solicitations and contracts. Thereafter, agencies like the [DoD](#) and [GSA](#) started publishing their own deviation clauses (together with the FAR Deviation, “the COVID-19 Deviation Clauses”) and issuing contract modifications.

This series of events has raised a host of concerns for Federal contractors. It is critically important that contractors understand (among other things): what these Deviation Clauses are; what they require; what compliance obligations the contractor has; what costs could be associated with compliance; what consequences may stem from non-compliance; and how to handle modifications and solicitation amendments incorporating the COVID-19 Deviation Clauses. Grab a seat and buckle up, because there is a lot to discuss and a number of steps you should start taking to ensure compliance and protect your rights.

## Introduction

As expected, the Guidance took a great leap forward in furthering the President’s September 9, 2021 [“Path out of the Pandemic”](#) agenda. The Guidance focuses on three main aspects of COVID-19 related safety for Federal contractors and their employees. Specifically, covered businesses are required to conform to the following workplace safety protocols:

1. COVID-19 **vaccination** of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
2. Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to **masking and physical distancing** while in covered contractor workplaces; and
3. Designation by covered contractors of a person or persons to coordinate **COVID-19 workplace safety efforts** at covered contractor workplaces.

The Task Force anticipates it will update and add to its Guidance as the CDC issues more of its own guidance. The Guidance specifies all covered contractors must comply with future additional guidance.

The majority of contractors we have talked to are most concerned, in the immediate term, with the vaccine requirements set forth in the first prong of the Guidance. However, there are some major potential pitfalls associated with the other two prongs, as well, which also warrant discussion. It will be necessary to walk through each of these three prongs to give you a thorough understanding of your compliance obligations. We will delve into the three requirements themselves in more detail in just a bit. But first, let’s start with establishing which Federal contractors are subject to the Guidance, and which contracts, spaces, and employees are considered “covered,” and when.



# Covered Contractors and Contracts

## 1. The Short Version

To whom does this new Guidance apply? That's simple: All "Covered Contractors." Once a business performs prime or subcontract work on a Federal contract that contains the Clause (i.e. a COVID-19 Deviation Clause), the contractor is considered a "Covered Contractor". Note that there is no exception or relaxation of the requirements for small business contractors. These requirements apply to contractors of all sizes. In other words, a "Covered Contractor" means a prime contractor or subcontractor at any tier who is party to, or performing work flowing down from, a "Covered Contract." What, then, is a "Covered Contract?" Simply put, a "Covered Contract" is one that includes the Clause, i.e. a COVID-19 Deviation Clause.

## 2. How to Tell if Your Existing, New, or Future Contract Already is, or is Likely to Become a "Covered Contract"

As explained in our [previous blog post](#), the Order mandated that a Clause be included in any new contracts/contract-like instruments, new solicitations for contracts/contract-like instruments, extensions or renewals of existing contracts/contract-like instruments, and exercises of options of existing contracts/contract-like instruments, provided that the scope of the contract/contract-like instrument involves services, construction, leasehold interest in real property, services covered by the Service Contract Act, contracts for concessions, or contracts/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 (collectively, "the Covered Scopes of Work"). Exempted from the Order were grants, contracts/contract-like instruments with Indian Tribes, contracts and subcontracts at or below the Simplified Acquisition Threshold, workplaces outside of the United States, and subcontracts solely for the provision of products.

Within these parameters, a COVID-19 Deviation Clause must be added to all new solicitations issued after October 15, 2021. (Note that many solicitations were amended in early October to include a COVID-19 Deviation Clause.) Moreover, a COVID-19 Deviation Clause will be added

to all new contracts/contract-like instruments **awarded** after November 15, 2021. With respect to contract or contract-like instruments awarded between October 15 and November 14, 2021, agencies are required to include the COVID-19 Deviation Clause if the solicitation was issued on or after October 15, 2021 (in which case the solicitation itself would include the Clause); otherwise, the agency is not **required** but is **strongly encouraged** to include a COVID-19 Deviation Clause.

For existing contracts, the Guidance mandates that a COVID-19 Deviation Clause be incorporated at the point where an option is exercised or an extension is made. The Guidance strongly encourages agencies to add a COVID-19 Deviation Clause into all existing and future contracts, even those contracts not deemed to be "Covered Contracts." Such modifications are currently being issued on many existing contracts. The GSA in particular seems like it has been very quick to start issuing modifications.

## 3. Subcontractor Considerations and Flow-Down Requirements

As explained in the Order and our [previous post](#), if the Clause is in a prime contract or contract-like instrument, the contractor is required to flow it down, as are all subcontractors and sub-subcontractors down the line. As the Guidance explains:

"The requirements in the order apply to subcontractors at all tiers, except for subcontracts solely for the provision of products. The prime contractor must flow the clause down to first-tier subcontractors; higher-tier subcontractors must flow the clause down to the next lower-tier subcontractor, to the point at which subcontract requirements are solely for the provision of products."

In other words, if you are a prime contractor performing a Covered Contract for the Federal government, you need to flow these compliance requirements down to your subcontractors, and their subcontracts then are deemed Covered Contracts, meaning the subcontractor needs to flow the requirements down to their subcontractors, etc., all the way down the line. If you are a subcontractor, expect that your primes will soon be reaching out about including a COVID-19 Deviation Clause in your subcontracts; you will need to flow it down to your lower-tier subcontractors.

#### 4. Summary Concerning Covered Contracts and Contractors

In short, if you have a COVID-19 Deviation Clause in your contract or subcontract, you are a Covered Contractor.

Such a Clause will be in your Federal contract (or your prime contractor will be flowing the Clause down to you in a subcontract) if the prime contract is a contract or contract-like instrument involving the above-delineated Covered Scopes of Work, which is awarded after November 15, 2021, or is awarded between October 15, 2021, and November 15, 2021, if the Solicitation was issued after October 15, 2021 (or amended to include the Clause). In addition, a COVID-19 Deviation Clause will be present in prime contracts (and flowed down to subcontracts entered into in connection with prime contracts) that are extended, or have options exercised after October 15, 2021.

Given the “strong encouragement” to agencies to include a COVID-19 Deviation Clause wherever possible, it is extremely likely that a COVID-19 Deviation Clause will show up, via modification, in most existing contracts, as well. As noted above, we have already seen this happening in many cases, especially at GSA.

## The Three Safety Protocols

Now that we understand the scope of Covered Contracts and Covered Contractors, let’s take a look at what these vital COVID-19 Deviation Clauses cover, and what Covered Contractors will be required to do in order to comply. As outlined above, the Guidance covers – and the COVID-19 Deviation Clauses mandate compliance with – three primary areas of safety protocol.



#### 1. The Vaccine Requirement

##### a. Who Needs to Be Vaccinated?

Covered Contractors (as defined above) must ensure that all of their “Covered Contractor Employees” are “fully vaccinated,” unless the employee is legally entitled to an accommodation. “Covered Contractor Employees” include any full-time or part-time employee who is:

- working on or in connection with a Federal Covered Contract (as defined above); OR
- working at any location controlled by a Covered Contractor, at which any employee of a Covered Contractor, who is working on or in connection with a Covered Contract, is likely to be present during the period of performance for a Covered Contract (defined as a “Covered Contractor Workplace.”)

The Guidance has also made it clear that these protocols apply to any Federal contractor employees working at a “Federal Workplace,” which is defined as “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.” (More on Federal Workplaces-specific vaccination issues below.)

A couple of really important things to highlight with regard to the definition of Covered Employees:

- First, this definition includes Federal contractor employees who work remotely or at home, to the extent that they are “working on or in connection with a [C]overed [C]ontract.” The Guidance specifically explains that an individual working from their residence on a Covered Contract is considered a “Covered Contractor Employee,” and must therefore comply with the vaccination requirement, even if the employee never works at either a Covered Contractor Workplace or Federal Workplace.
- Second, note that “in connection with” (as in “working on or in connection with a [C]overed [C]ontract”) is defined quite broadly. Back-of-house people like HR, billing and legal are included.
- Third, this definition covers even those employees who are not themselves working on or in connection with a Federal Covered Contract, if they are working in a location where other employees who are working on a Federal Covered Contract will be present.

Indeed, the Guidance goes so far as to specify that it does not matter if the Covered Contract work is taking place in only one building on a multi-building campus, or in/on only one area, floor or site within a building. Unless the contractor can establish that there will be no interaction between the employees performing the Covered Contract work and the other work, the whole area is considered a "Covered Contractor Workplace" and everyone who works there is, therefore, deemed a Covered Contractor Employee. Note that the Guidance indicates that it applies to workplace locations that are outdoors as well as indoors.

In other words:

- If you are performing as a prime or subcontractor on a Covered Contract, all of the employees working on that contract – regardless of the location at which they are working, including home or remote work, will need to be fully vaccinated.
- Back-of-house people working "in connection with" those Covered Contracts will also need to be fully vaccinated.
- If you have employees working at a Federal Workplace (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), they will need to be fully vaccinated.
- If you have some employees that work on/in connection with Covered Contracts, and some that do not, there is a very good chance that even those employees who do not work on the Covered Contracts themselves will need to be fully vaccinated if they work at your offices/sites/facilities with other employees who are working on Covered Contracts.

**The bottom line: It is very possible that the vast majority of your workforce, if not all of your workforce, will need to be fully vaccinated, even if not all of your workforce works on Federal contracts.**

*b. What Is Meant by "Fully Vaccinated?" Approved Vaccines, Timing, Testing*

The Guidance provides further insight as to what exactly, "vaccinated" means. For purposes of these vaccination

requirements, "Fully Vaccinated" means having received the full course of a vaccine treatment currently approved or authorized for emergency use by the FDA or the World Health Organization. Pfizer-BioNTech, Moderna, and Johnson & Johnson [J&J]/Janssen are all included in this list, as are AstraZeneca/Oxford. Certain vaccines currently in clinical trials (like Novavax) may also meet the criteria. (Check [here](#) for more info.)

People are considered fully vaccinated for COVID-19 two weeks after they have received either: (1) the second dose in a two-dose series (like Pfizer or Moderna), or (2) their single-dose vaccine (like J&J). There is currently no post-vaccination time limit on fully vaccinated status (i.e. no post-vaccine expiration dates). However, should such a limit be established in the future, the Guidance (and required safety protocols) might be revised to add more vaccines or other safety protocol requirements. Remember, for now, that current CDC guidance recommends booster shots for persons over 65, and for those aged 50-64 with [underlying medical conditions](#) including asthma, high blood pressure, diabetes, heart disease and a body mass in excess of 25BMI.

No exceptions are allowed for natural immunity for those employees who have already had, and recovered from, a COVID-19 infection; a recent antibody test cannot be used to prove, or as a substitution to, vaccination. There is no option for frequent testing in lieu of vaccination requirements.

Covered Contractors are not required to provide onsite vaccination clinics, though they may choose to do so. At a minimum, the Guidance says, contractors should "ensure their employees are aware of convenient opportunities to be vaccinated."

*c. Vaccination Deadlines*

Those folks that initially fit the definition of "Covered Contractor Employees" must be fully vaccinated by December 8, 2021. After that, Covered Contractor Employees must 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 Clause has been incorporated into that now-Covered Contract. In other words, the date on which you need to have your covered employees fully vaccinated will depend on the applicable dates relating to your Covered Contract(s) and, relatedly, whether or not

the Clause has yet been added to your solicitation/contract. Covered Contractor Employees who work only at a Federal Workplaces need to be fully vaccinated by December 8, 2021, unless legally entitled to an accommodation. If you have questions about what deadlines apply to your employees and why, consult a legal professional.

#### *d. Contractor Requirement to Review Proof of Vaccination*



Covered Contractors must review employees' vaccine documentation to ensure compliant vaccination status. Specifically, they must demand their covered employees show or provide one of the following forms of vaccination proof: (1)

a copy of the record of immunization from a health care provider or pharmacy; (2) a copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813\_r, published on September 3, 2020); (3) a copy of medical records documenting the vaccination; (4) a copy of immunization records from a public health or State immunization information system; or (5) a 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 the vaccine. Digital copies of these records, including digital photographs, scanned images or PDFs will be deemed acceptable. An attestation of vaccination by the covered contractor employee is not an acceptable substitute for documentation of proof of vaccination.

#### *e. Exceptions and Accommodations*

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. Covered Contractors may determine their own accommodation policies and whether to extend an accommodation, except in co-employment circumstances where the Federal government must concur with proposed accommodations. We predict further guidance on this point will become necessary in the near future. In the meantime, it would be wise to discuss

these items with your human resource team, and with a labor & employment attorney.

The Guidance provides an additional exception to the vaccine requirements for situations where the Federal government has an "urgent, mission-critical need" for a contractor to have their employees begin work before getting vaccinated. In that case, the agency head may approve an exception, but the contractor must ensure that its Covered Contractor Employees are vaccinated within 60 days of beginning work and that its covered employees comply with masking and physical distancing requirements for not-fully-vaccinated individuals prior to being fully vaccinated. We expect this exception will be rarely invoked if invoked at all. In any case, it would be within the discretion of the government, not the contractor.

#### *f. Special Vaccine Considerations for Employees on a Federal Facility*

In addition to the September 24th Guidance discussed herein, on October 4, 2021, the Task Force published guidance for [Federal Employees, Visitors and Onsite Federal Contractors](#). Buried in that new guidance is the requirement for contractor-employees **who are not yet contractually required to be vaccinated** to complete and carry with them at all times proof of a negative COVID-19 test, taken within three days prior to entry on the federal building unless the employee is already regularly tested by the agency. The guidance states agencies should provide a [Certification of Vaccination Form](#) to onsite contractor employees, on which contractor employees are required to attest to their vaccination status under penalty of perjury, and fine and imprisonment under 18 USC §1001. Agencies are allowed to build a database of the Certification of Vaccination Forms, and the employee is required to keep this form on their person while in the federal building. Under this new guidance, if the agency has reasonable grounds to believe an onsite contractor employee made a false statement on the Certification of Vaccination Form, the agency may require the Federal Contractor employer to verify their employee's vaccination documentation and confirm to the agency that the employee has been vaccinated.

## **2. Masking and Distancing Requirements**

The second prong of the Guidance relates to Masking

and Distancing. Covered Contractors must ensure that all individuals – including not only Covered Contractor Employees (as defined above) **but also visitors** – comply with published CDC guidance for masking and physical distancing at all “Covered Contractor Workplaces.” (As explained above, this includes any location where an employee of a Covered Contractor who is working on or in connection with a Covered Contract is likely to be present while performing said Covered Contract). These protocols also apply at Federal Workplaces.

#### a. Masking



With regard to masking, a distinction is drawn between vaccinated and unvaccinated individuals. Distinction is also drawn between indoor and outdoor spaces, and, further between areas experiencing different levels of community transmission (to be determined by looking at the [CDC COVID-19 Data Tracker County View](#)). Currently, the CDC lists almost the entire country as an area of high transmission.

- Individuals who are not fully vaccinated (who, presumably are either a visitor or are a Covered Contractor Employee who has remained unvaccinated due either to a medical or religious accommodation) must wear a mask indoors regardless of the level of community transmission in the area. They must also, regardless of community transmission levels, wear a mask in crowded outdoor settings or during outdoor activities that involve sustained close contact with other people who are not fully vaccinated, consistent with CDC guidance.
- For vaccinated individuals, masking requirements depend on the levels of community transmission.
  - In areas of low or moderate community transmission, fully vaccinated people do not need to wear a mask.
  - In areas of high or substantial community transmission, fully vaccinated people must wear a mask in indoor settings, except for limited exceptions.

The Guidance provides for masking requirement exceptions based on medical/disability accommodations, as well as religious accommodations, similar to those outlined above

with regard to the vaccine requirements. The Guidance allows for additional exceptions to the masking requirements for employees who are engaging in:

- activities in which a mask may get wet;
- high-intensity activities where covered contractor employees are unable to wear a mask because of difficulty breathing;
- or activities for which wearing a mask would create a risk to workplace health, safety.

Finally, there is a general “catch-all” allowance for employers to make exceptions consistent with CDC guidelines. (The Guidance cites the example of when an individual is alone in an office with floor to ceiling walls and a closed door, or for a limited time when eating or drinking and maintaining appropriate distancing.) Other than briefly lowering the mask to prove identity, any exceptions must be made in writing by the contractor’s authorized representative.

Where a mask is required, “mask” means a mask that is consistent with CDC recommendations, as set forth in the CDC’s [“Types of Masks and Respirators.”](#) Covered Contractors must require those employees and visitors who are required to wear a mask to:

- Wear appropriate masks consistently and correctly (i.e. over mouth and nose).
- Wear appropriate masks in any common areas or shared workspaces (including open floorplan office space, cubicle embankments, and conference rooms).

#### b. Distancing

With regard to distancing: To the extent practicable, individuals who are not fully vaccinated should maintain a distance of at least six feet from others at all times, including in offices, conference rooms, and all other communal and workspaces.

Fully vaccinated individuals do not need to physically distance themselves regardless of the level of transmission in the area.

#### c. Visitors; Signage

To the extent that this Guidance requires Covered Contractors to mandate masking and distancing for not only employees, but also **visitors**, on the basis of vaccination status, and because Covered Contractors may know the

vaccination status of their employees but not of all visitors, the question arises: How are Covered Contractors supposed to determine the vaccination status of all visitors? In response to that question, the Guidance provides the following limited guidance:

“Covered contractors should post signage at entrances to covered contractor workplaces providing information on safety protocols for fully vaccinated and not fully vaccinated individuals, including the protocols defined in the masking and physical distancing section above, and instruct individuals to follow the appropriate workplace safety protocols while at the covered contractor workplace. Covered contractors may take other reasonable steps, such as by communicating workplace safety protocols to visitors prior to their arrival at a covered contractor workplace or requiring all visitors to follow masking and physical distancing protocols for not fully vaccinated individuals.”

#### d. Monitoring Requirements

By far the most onerous piece of this masking/distancing requirement relates to the required monitoring of the Level of Community Transmission. Specifically, the Guidance requires that Covered Contractors check the [CDC COVID-19 Data Tracker County View](#), **for every area in which they have a Covered Contractor Workplace** (i.e. at any location they have employees performing a Covered Contract), at a minimum, **once a week**, to determine the current level of community transmission. They must then alter their masking/distancing policies accordingly, in line with the framework laid out above. When the levels increase too high or substantial, additional precautions must be put into place immediately, consistent with the Guidance. When the levels decrease from high or substantial to low or moderate, the contractor cannot immediately relax their policies; they must continue to enforce the increased restrictions until two weeks after the CDC tracker consistently declares a community transmission rate to be low or moderate. We see this as an area likely to cause careless errors and misunderstandings. We also see it as causing a lot of headaches and expenses for contractors.

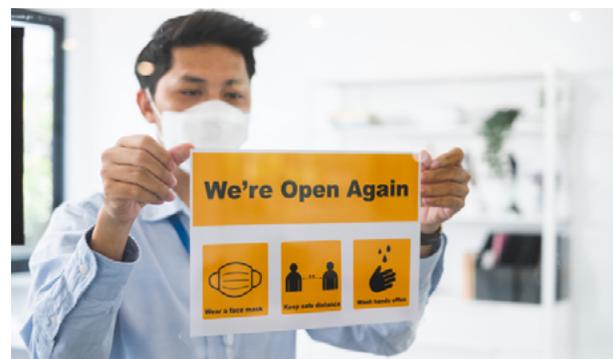
#### e. Additional Considerations

The Guidance states that in addition to the above, 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.

Note that while a remote-work employee might be subject to the vaccination requirements, as outlined above, an employee’s residence is not a “Covered Contractor Workplace” or a “Federal Workplace.” Accordingly, while in the residence, the individual need not comply with requirements for masking and physical distancing, even if working on a Covered Contract.

### 3. COVID-19 Workplace Safety Effort Coordinator Requirement



Finally, the third prong of the Guidance discusses the designation of a person or persons to coordinate COVID-19 workplace safety efforts. Covered Contractors must appoint a designated coordinator to implement the requirements set forth in the Guidance and COVID-19 Deviation Clauses, and to ensure compliance with the same.

This coordinator’s job should include things like communicating the Guidance’s requirements to employees and visitors, and drafting and posting appropriate signage that sets forth the requirements and safety protocols in a “readily understandable manner.” The designated individual (or individuals) must also ensure that Covered Contractor Employees comply with the requirements in this Guidance related to the showing or provision of proper vaccination documentation. Presumably, this could be the same person who weekly checks the CDC Tracker and assesses the current level of community transmission, and modifies protocols accordingly.

## Enforcement

In the absence of any Task Force Guidance alleging additional applicability of criminal statutes, it appears that agencies

will rely on standard contract remedies (breach, default, etc.) and even potentially the False Claims Act to enforce compliance with the Guidance. If that changes, we'll keep you posted.

## Agency Incorporation of COVID-19 Deviation Clauses Into Solicitations and Modifications

As outlined above, the Order mandated that the Task Force come up with Guidance about a Clause, which would then be inserted into all Prime and Subcontract Covered Contracts. Pending the formal amendment of the FAR (and agency supplemental acquisition regulations) through official rule-making, the Clause was codified in the COVID-19 Deviation Clauses. From what we have seen, despite the October 15/ November 14 deadlines discussed above, Agencies didn't wait. They started – almost immediately after the FAR Deviation was issued – to amend pending solicitations to incorporate the COVID-19 Deviation Clauses. They also moved very quickly, trying to graft the COVID-19 Deviation Clauses into existing contracts through the issuance of (mostly bi-lateral, no-cost) modifications. As you begin to receive solicitation amendments and contract modifications, it is critically important to pay attention and think carefully about what the inclusion of these COVID-19 Deviation Clauses means for you.

### 1. Modifications

With regard to modifications, there are a number of issues to think through, and discuss with your attorney, before you sign. Two of the most important? Timing, and Costs.

- **Timing:** Once the COVID-19 Deviation Clause is incorporated into your contract, arguably, you are required to be immediately compliant. That includes meeting all of the vaccination, masking/physical distancing requirements outlined above, hiring the COVID-19 coordinator as explained above and flowing down the Clause to your subcontractors, which presumably would include negotiating and modifying your existing subcontracts. In most cases, it will not be possible to become immediately compliant. How much ramp-up time do you need, and will your

CO allow you that time before you sign? Talk to an attorney and figure out how to ask.

- **Costs:** The question of who is going to pay to implement these onerous requirements is a significant one. Neither the Order nor the Guidance address whether the costs associated with implementing these requirements are allowable. Nor did they address how and when contractors might seek reimbursement for such costs (or offset for associated delays). The COVID-19 Deviation Clauses make no mention of costs or delays. Many of the modifications we have seen thus far are set up as bi-lateral, no-cost modifications. (The DoD and GSA deviations actually require the modifications to be bi-lateral). Ideally, from a contractor's point of view, the proposed addition of a COVID-19 Deviation Clause to a contract should not be accepted as a routine no-cost matter and the modification should definitely not include any waiver or release language relating to your right to seek adjustment with regard to costs or delays. It may be worth seeing if the agency will agree to set the modification up as a "Change" pursuant to the applicable Changes Clause in your contract. If possible, you will want to include a reservation of rights regarding future adjustments to the contract price/duration, to allow for costs/delays associated with compliance efforts.

### 2. Solicitation Amendments

For solicitation amendments, you need to think about how to build the costs of compliance into your proposal. You also need to think about your subcontractors, and making sure they are all aware of these changes, and of their own compliance and flow-down requirements. You will also need to modify your template subcontracts to include the COVID-19 Deviation Clause flow-downs; it would also be wise to tweak the termination (default and convenience) and dispute clauses as well, given the complications that could arise from COVID-19 protocol compliance issues.

Keep in mind, unlike contractors who receive modifications – which could potentially be characterized as "Changes," entitling a contractor to an equitable adjustment – if the COVID-19 Deviation Clause is incorporated into a solicitation to which you respond, it will also be in the resulting contract when it is awarded. There will be no "Change" associated

with its incorporation. Accordingly, there will likely be no mechanism for you to seek additional costs or time associated with implementing the Guidance at a later date. The days and dollars that you need must be built in to your proposal, now.

### 3. More on Costs

You'll notice cost is something that we advise you to consider both in terms of amended solicitations and modifications to existing contracts. That seems obvious, but what might be a little less obvious is the fact that costing your compliance might prove to be a bit of a moving target.

The COVID-19 Deviation Clauses require compliance with Task Force Guidance. But the Guidance itself contemplates that it will be fluid, changing, and being added to as CDC Guidance changes. This means that once a COVID-19 Deviation Clause is in your contract, anything the Task Force publishes as "Guidance" becomes a contract requirement at no additional cost to the government. You will need to pivot as the Guidance does; how do you account for that?

In calculating what modification or proposal costs you may incur in implementing the required COVID-19 safety protocols required by the COVID-19 Deviation Clauses, you should consider – and discuss with your attorney – the ever-increasing list of potential compliance expenditures such as: development of proof of vaccine protocols; development of religious tolerance corporate policy; establishment of disability and religious exemption request review boards; obtaining clerical experts to provide reviews and draft advisory opinions; additional Americans with Disabilities Act (ADA) reviews; obtaining ongoing expert medical guidance and education updates regarding vaccine impacts on various medical conditions; conducting medical reviews; issuing opinions and findings on exemption requests; ADA accommodation implementation (workload adjustments, new equipment, workspace & facilities modifications); hiring new COVID-19 Task Force Guidance coordinator position(s); conducting weekly CDC transmission tracker updates & making adjustments to workforce requirements; drafting, publication and enforcement of corporate policy on mask wearing requirements such as whether, when and where an employee may lower a mask to eat or drink on premises; creation and postage of signage; development and implementation of visitor policy/protocols; reconfiguration of workspaces

to comply with CDC social distancing requirements; costs of compliance with unknown and unknowable future CDC guidance impacts and expenses; union Collective Bargaining Agreement negotiations and potential concessions; issuing and managing Clause flowdown subcontract modifications; attorney and consultant fees; terminating employees who refuse to cooperate with the new requirements (including employment contract buyout costs); candidate search/hiring screening & interviews/onboarding for replacement of terminated employees; relocation packages; increased wages and benefits for replacement employees; plus all of the above for your subcontractors. In addition, Covered Contractors should price the risk of dealing with: subcontract flow-down refusal or inability, resulting in a termination for convenience of the subcontract and potential breach of contract dispute; false certification of contract compliance if Covered Contractors are not immediately in compliance at the time of the contract modification; labor disputes brought by unions and employees; vaccine injury or wrongful death lawsuits brought by employees who consented to the vaccine because they were threatened with employment termination for refusal to vaccinate; Agency denial of requests for equitable adjustment leading to claims and Contract Disputes Act litigation; adverse Agency contract actions such as CPARS, Letters of Concern, Cure Notices, Show Cause and Terminations for Default should Covered Contractors be unable to perform under conditions caused by the Clause; future unknown requirements to be published by Safer Work Taskforce and CDC; and all of the above on behalf of your subcontractors.

## Takeaways/Action Items for Covered Contractors

As you can tell from the lengthy and detailed nature of this alert, Federal contractors have a lot to carefully consider. Compliance with the protocols and requirements outlined above is bound to cause confusion and, almost certainly, increased costs of performance. Our hot tips?

- Don't sign any modification to include, or respond to any solicitation that has been amended to include, a COVID-19 Deviation Clause without speaking to an attorney and going over all of this, with respect to your individual circumstances, in minute detail. Be VERY wary of waiver or release language in modifications.
- Even if you have not yet received a modification,

and have no new awards pending, or amended solicitations in your sights: Get started **NOW**. If you have questions about whether you, your contracts, your workplaces, or your employees are or are not covered, talk to an attorney. Assuming you are or will soon be covered (a safe bet, given the breadth of this Guidance and the underlying Order) start working on a compliance plan now. Figure out who you wish to designate (or hire) as your COVID-19 Safety coordinator and start getting them up to speed on the intricacies of the Guidance.

- Similarly, start gathering employee vaccination information now, so you can narrow down who has and has not already been vaccinated. For those who are not already vaccinated, discuss whether they believe they are subject to accommodation. For those who are not subject to accommodation, but nonetheless refuse to be vaccinated, start planning to employ them elsewhere or talk to a lawyer about termination options.
- Don't forget your lead times. Remember, "fully vaccinated" means 2 weeks after the final vaccine dose. You and your employees need to build that 2 weeks (as well as the 3-4 recommended weeks between vaccine doses) into your timeline to ensure compliance by the applicable vaccination deadline (for many of you, that's December 8).
- If you have concerns about religious or medical accommodations, employee-push back in response to vaccination or vaccination-proof requirements, or adverse action from employees with negative side-effects of vaccination, be proactive. Talk to a labor and employment attorney and get a strategy in place that helps mitigate risk while also ensuring compliance. Our team is happy to help.
- Start modifying your subcontracting templates to include any mandatory flow-downs of the Clause, and start talking to your subcontractors to ensure they understand these requirements as well as you do. Think about tweaking other Subcontract clauses – terminations and disputes, among others – as well.
- Keep in mind: These requirements have been issued in accordance with Federal law and thus supersede any contrary State or local law or ordinance, including in those States or localities that have sought to prohibit compliance. At the same time, nothing in the Guidance shall excuse noncompliance

with any applicable State law or municipal ordinance establishing protective workplace safety protocols that are stricter than those established under the Guidance. Compliance with OSHA does not excuse a Covered Contractor from also complying with the Task Force's Guidance.

- Start thinking about how to build in anticipated compliance costs on new bids and proposals, etc. Similarly, to the extent you expect to start receiving modifications on existing contracts, start thinking about what implementation will cost. Overall, [as we previously advised](#), carefully and precisely segregating and tracking Task Force Guidance compliance costs in real-time will be a tremendous benefit.

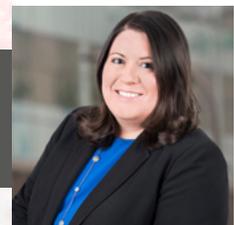
We'll keep you posted as this situation develops. In the meantime, we again recommend that you take a proactive approach and get started on compliance efforts as soon as possible! If you have any questions about how to proceed in this new environment, please [give us a call](#).

---

*The information contained in this publication should not be construed as legal advice, is not a substitute for legal counsel, and should not be relied on as such. For legal advice or answers to specific questions, please contact one of our attorneys.*

### **Maria L. Panichelli**

maria.panichelli@obermayer.com  
215.665.3017



### **Karen L. Douglas**

karen.douglas@obermayer.com  
215.665.3273

