

Vaccine Mandate for Federal Contractors

Who is affected and how do we achieve compliance?

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Agenda

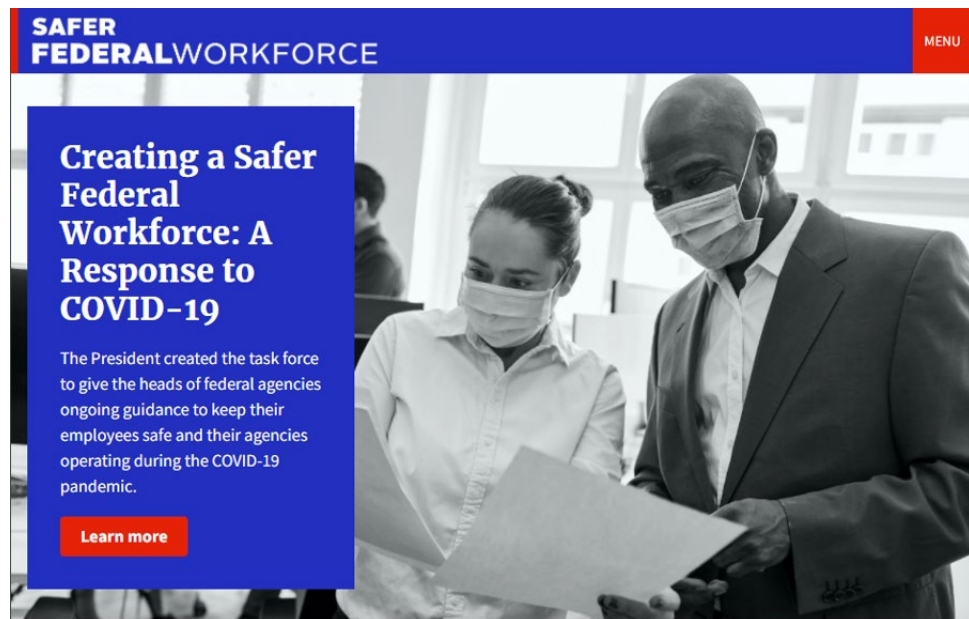
- Background
- The FAR Clause
- Safer Federal Workforce Task Force's Guidance and FAQs
- Special Considerations for Landlords
- Compliance Risks
- State Challenges to the E.O.

Background: Executive Order 14042

- On Sept. 9, President Biden issued an Executive Order mandating the creation of a new FAR clause requiring compliance with the **Safer Federal Workforce Task Force's** COVID-19 Workplace Safety Guidance
 - Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors
- Distinguishable from –
 - Federal employees COVID vaccination requirement
 - E.O. 14043
 - OSHA COVID Emergency Temporary Standard
 - E.O. 13999 & 86 FR 61402 (interim final rule)
 - CMS COVID vaccination requirement for staff at Medicare- and Medicaid-certified providers
 - 86 FR 61555 (interim final rule)
 - Implementation **BLOCKED** in 10 states as of Nov. 29 (E.D. Missouri)

Background: Safer Federal Workforce Task Force

- Led by the White House's COVID Response Team, GSA, and OPM
- Responsible for publishing **COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors** referenced in the E.O.
 - And **FAQs!**



Background: The Task Force Guidance, Generally

- The Task Force issued its initial Guidance to contractors and subcontractors on Sept. 24; updated the Guidance on Nov. 10
- Note: the Guidance is subject to change (*i.e.*, may be updated/amended, may impose new/additional requirements)

You can find the Guidance on the Task Force's website:
<https://www.saferfederalworkforce.gov/>

COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;

Compliance by individuals (employees and visitors) with masking and physical distancing while in covered contractor workplaces; and

Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

The FAR Clause: FAR 52.223-99

- FAR Council, Issuance of Agency Deviations to Implement E.O. 14042 (Sept. 30)
 - Provides agencies with “initial direction” for the incorporation of a clause to implement guidance issued by the Task Force pursuant to the E.O.
 - Recommends agencies exercise their authority under FAR subpart 1.4 to develop and issue deviations

The FAR Clause: Applicability

- The E.O., as well as the FAR Council guidance, requires agencies to include the clause in accordance with the following:
 - Contracts awarded prior to Oct. 15 where performance is ongoing → when an **option** is exercised or an **extension** is made
 - **New contracts** awarded on or after Nov. 14 → the clause must be included
 - Contracts awarded between Oct. 15 and Nov. 14 →
 - **New solicitations** issued on or after Oct. 15 will include the clause
 - Otherwise “encouraged” to be included
- Agencies may (and are) attempting to incorporate the clause in existing contracts via **bilateral modifications**
 - Requirements cannot be imposed unilaterally
 - *Subject to the Changes clause

The FAR Clause: Compliance

(c) *Compliance.* 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 <https://www.saferfederalworkforce.gov/contractors/>

- “...*all guidance*, including *guidance conveyed through Frequently Asked Questions, as amended*....”
- Incorporates by reference the Task Force’s website
 - Because the Guidance is subject to change (FAQs & “as amended”), contractors must monitor [saferfederalworkforce.gov](https://www.saferfederalworkforce.gov) constantly

The FAR Clause: Flowdown Requirement

(d) Subcontracts. 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.

- Required in subcontracts “at any tier” that –
 - (1) exceed the SAT (presently, **\$250,000**) “on the date of subcontract award”
 - (2) “are for **services**, including construction”
 - (3) “performed in whole or in part **within the United States** or its outlying areas”

Task Force Guidance & FAQs: Vaccination Requirement

- Task Force published updated **COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors** (Nov. 10)
 - Requires **covered contractor employees** to be **fully vaccinated** no later than Jan. 18, 2022, unless legally entitled to an exemption
- Employees are **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”
 - Employees thus must receive their second dose or single dose by **Jan. 4**

Task Force Guidance & FAQs: Coverage

- “**Covered contractor**” → “a prime contractor **or subcontractor** at any tier who is party to a covered contract,” which includes GSA landlords
- “**Covered contractor employees**” → “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**”
 - Definition includes “employees of covered contractors **who are not themselves working on or in connection with a covered contract**”
- **Covered contractor workplace** → “a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is **likely to be present** during the period of performance for a covered contract”

Task Force Guidance & FAQs: Coverage, Corporate Affiliates

- **Employees** of a covered contractor's **corporate affiliates** are considered "**covered contractor employees**" if the employees "perform[] work at a covered contractor workplace"
 - FAQs adopt SBA's test for affiliation—"control or the power to control"
- Workplaces controlled by a covered contractor's corporate affiliate are considered "**covered contractor workplaces**" if covered contractor employees are "**likely to be present**" during the period of performance for a covered contract" at the corporate affiliate's workplace

Corporate affiliate's employees = "covered contractor employees" *if performing work at covered a contractor workplace*

Corporate affiliate's workplace = "covered contractor workplace" *if covered contractor employees are "likely to be present" at the workplace*

Task Force Guidance & FAQs: Coverage, GSA Guidance

Who Needs to be Vaccinated per the Clause

Unless there is a legal exception, it applies to:

1.

Any contractor employee working on a covered contract*

2.

Any contractor employee working “in connection with a covered contract” -- Think anyone in an overhead pool

3.

Anyone who would come into contact with the individuals in circles 1 or 2 at contractor facilities (covered workplace location)**

* “covered contract” means any contract or subcontract that includes the new clause

** for example, in elevators, restrooms, cafeterias, parking garages/lots, etc.

Task Force Guidance & FAQs: Accommodations

- Covered contractors “may be required to provide an **accommodation** to covered contractor employees . . . 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**”
 - Entitlement to accommodations decided by the contractor (not the agency)
- On the “**sincerely held religious belief, practice, or observance**” exemption → see EEOC, [*What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*](#)

Task Force Guidance & FAQs: Accommodations

- Employees not vaccinated against COVID-19 (whether because of a medical condition, sincerely held religious belief, or otherwise) do not meet the definition of “fully vaccinated”
 - Thus must continue to abide by the **masking and physical distancing protocols** mandated by the Task Force for unvaccinated personnel
- If the contractor employees’ work requires the employees to perform onsite at federal workplaces, then those employees must abide by the agency’s workplace safety protocols
 - Agencies have the discretion to determine that the nature of the covered contractor’s work requires **vaccination**
 - Thus, in some instances, this means that contractor employees that are not fully vaccinated—due to a medical or religious accommodation—would be **unable to perform the work onsite** at the federal workplace

Task Force Guidance & FAQs: Enforcement

- The Task Force addressed covered contractors' enforcement of the Guidance & agency enforcement of the requirements in updated FAQs on Nov. 1
- For covered contractors with employees resisting the vaccine requirement, the FAQs leave enforcement largely to the contractors' discretion
 - Contractors “should determine the **appropriate means of enforcement**” such as following “usual processes for enforcement of workplace policies”
- Model being followed by federal agencies: “utilize an enforcement policy that **encourages compliance**, including through a **limited period of counseling and education**, followed by **additional disciplinary measures** if necessary”
 - “Removal,” presumably from work on or in connection with a covered contract, “occurs only after **continued noncompliance**”

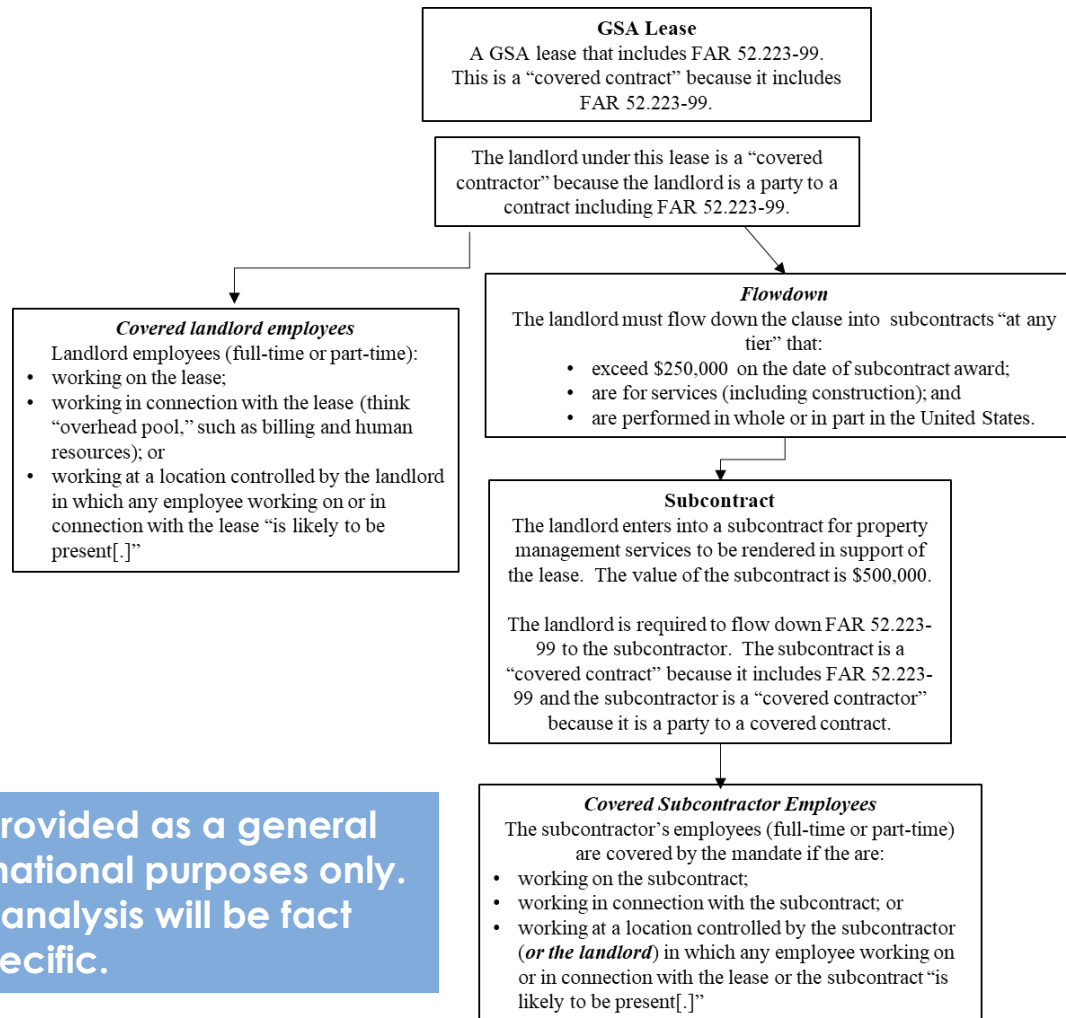
Task Force Guidance & FAQs: Enforcement

- With regard to federal agencies' enforcement of the Guidance, contracting officers “should **work with**” **contractors who encounter challenges with compliance**, where the contractors are working “in **good faith**” to comply
- Covered contractors **not** working in good faith? Agencies **should** (but not **must**) take “significant actions, such as termination of the contract”
 - Leaves open-ended what other “significant actions” agencies may take

Special Considerations for GSA Landlords

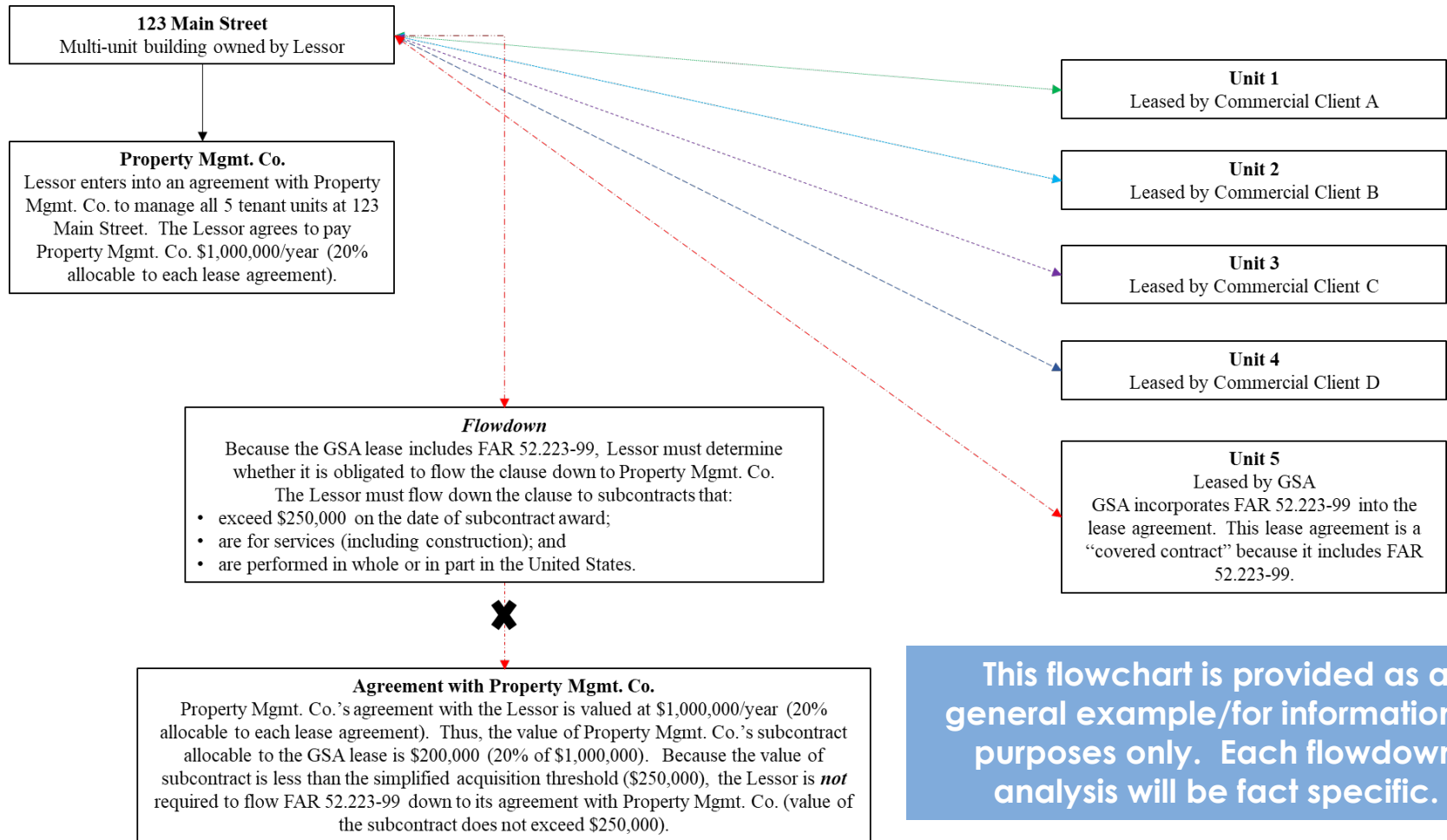
- Leased properties held by single purpose entities
 - Employees?
 - “Covered contractor employees”?
- Flow-down requirement (**FAR 52.223-99(d)**)
 - Service contracts in excess of the SAT (\$250,000)
 - Flow-down to the property manager (or other property service providers) in buildings with government and commercial tenants?
 - *OFCCP v. Coldwell Banker*

Special Considerations for GSA Landlords



This flowchart is provided as a general example/for informational purposes only. Each flowdown analysis will be fact specific.

Special Considerations for GSA Landlords



Compliance Risks

- “If a covered contractor is not taking steps to comply, **significant actions**, such as termination of the contract, should be taken.”
- Administrative remedies
 - Declining to exercise available options
 - Suspension of contract payments
 - Negative performance evaluations, responsibility determinations
 - Termination
 - Suspension and debarment
- The civil False Claims Act
 - Implied certification
 - Materiality?
- **Good faith**

