

## Planning for implementing EO 14042

### Background

Executive Order 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors* (the Order), directs executive departments and agencies to ensure that contracts and “contract-like instruments” covered by the Order include a clause requiring the contractor—and its subcontractors at any tier—to, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force).

In accordance with the Task Force guidance, Federal contractors and subcontractors with a covered contract will be 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 guidance applies to contracts and “contract-like instruments” and although OMB has indicated that the order does not cover cooperative agreements issued under financial assistance regulations it is expected that OMB will issue supplemental guidance on the application of the policy principles to financial assistance. After it is issued, further Department guidance will be forthcoming.

On September 30, 2021, the FAR Council issued “*initial direction to support agencies in their issuance of deviations to incorporate a clause into their solicitations and contracts that implements guidance issued by the Safer Federal Workforce Task.*” The FAR Council’s initial guidance directs agencies to—starting on October 15—add a [clause](#) related to these COVID-19 workplace safety protocols to covered Federal procurement solicitations and contracts (and options in existing contracts and renewals/extensions of existing contracts) subject to the FAR. The clause requires contractors and subcontractors at any tier under contracts and subcontracts for services, including construction, to comply with all guidance for contractor workplace locations as published by the Task Force. The FAR Council’s initial guidance includes detailed applicability and effective dates that agencies must use in their FAR class deviations.

The FAR Council’s initial guidance also strongly encourages agencies to incorporate the clause, consistent with applicable law, into existing solicitation and contracts. CAAC Letter 2021-03, issued on September 30, 2021, is congruent with the FAR Council’s guidance.

The FAR Council’s initial guidance and the CAAC letter exclude:

- contracts and subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act; and
- solicitations and subcontracts if performance is outside the United States.

### Supplemental and Additional Guidance from OMB and DOE/NNSA

On October 1, 2021, the Department issued a FAR Class Deviation—per the FAR Council’s direction to agencies and CAAC Letter 2021-03 of September 30, 2021—“*to incorporate a clause into solicitations*

and contracts that implements guidance issued by the Safer Federal Workforce Task Force pursuant to Executive Order 14042, *Ensuring Adequate COVID Safety Protocols for Federal Contractors.*” The Department’s Class Deviation, mirroring the FAR Council’s direction and the CAAC Letter, includes requirements (as well as applicability and effective dates) for new contracts, new solicitations, orders, extensions or renewals of existing contracts, and options on existing contracts. Also, in accordance with FAR Council direction, the Deviation encourages Contracting Officers to incorporate the clause into existing contracts.

The health and safety of the Department’s entire workforce, including its Federal and contractor employees, is one of the Department’s highest priorities. Vaccinations are our best tool to ending the pandemic and beginning the process of reentering the workplace. Therefore, the Department strongly endorses the widest possible implementation of Executive Order 14042 and expects its Contracting Officers to apply all guidance as liberally, resourcefully, and quickly as possible to existing contracts, consistent with all applicable laws and regulations.

Heads of Contracting Activities and Contracting Officers should plan now and take any prudent actions within their authority to maximize vaccinations by widely implementing the Department’s FAR Class Deviation and associated guidance. Actions to be taken include the following:

- Regarding **existing contracts**, give priority to modifying Management and Operating (M&O) contracts, major site/facility contracts, and onsite support service contracts. Contracting Officers should make every effort to execute contract modifications within one week of the date of the Department’s issuing its FAR Class deviation. The Department’s policy is to work with its M&O contractors and major site and facility contractors that include DEAR 970.5204-2, *Laws, Regulations, and DOE Directives*, to incorporate the clause via bi-lateral modification or, if necessary, unilaterally via incorporating a DOE Directive and Contractor Requirements Document (CRD) for those contracts.
- Action should be taken to modify **onsite support service contracts** bilaterally unless the contract includes DOE clause DOE-H-2071, *Department of Energy Directives*. Taking this action as expeditiously as possible is important to ensure the safety of employees working onsite.
- Regarding **exercising contracts’ options and extending contracts’ terms**, the E.O. and the Department’s Class Deviation are clear: the new clause must be included once the Class Deviation becomes effective. Consequently, Contracting Officers should begin coordinating now with affected contractors.
- Regarding **solicitations that have been issued and for which the closing date for receipt of proposals has not occurred**, if it is possible, amend the solicitation to incorporate the class deviation.
- OMB advised Agencies to attempt to implement their FAR Class Deviations even prior to the date upon which the Order requires inclusion of the clause in new covered Federal solicitations and contracts, including options in existing contracts and renewal/extension of existing contracts.
- OMB encouraged agencies to incorporate, consistent with applicable law, a clause requiring compliance with the Task Force’s new guidance into contracts that are not covered or directly addressed by the order because **the contract is under the Simplified Acquisition Threshold** (as defined in section 2.101 of the FAR) or is a **contract or subcontract for the manufacturing of products**.

- Regarding **possible requests for equitable adjustments**, if the contractor is contemplating or has submitted one; work with cognizant program officials and the contractor to determine if one is appropriate; if so, begin the process of determining a fair and reasonable adjustment as soon as possible.
- Sharing all publicly available information with the program officials and contractors, including the Department's FAR Class Deviation.
- Discussing with the contractor its policies, collective bargaining unit agreements, and other agreements with employees pertaining to mandated vaccinations.
- Communicating frequently and collaboratively with all affected parties and maintaining transparency regarding decisions affecting contract performance and contractor personnel. What is prudent at this point must be determined on a case-by-case basis; each case will depend, among other things, on the contract, the Department's needs, and existing uncertainties.
- If issues arise or could arise, use every authority and flexibility to deal with them—law, regulation, the terms and conditions of the contract—to carry out the Department's policy and achieve the Department's mission.
- Taking into account mission critical contract requirements, and after consulting with program officials, making any appropriate contract modifications—in addition to the modification for the Department's FAR Class Deviation—in accordance with requisite approval requirements.
- The FAR class deviation requires that covered contractors shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract. Contracting Officers must remain current with updates to applicable Task Force guidance and FAQs by regularly checking the OMB website and shall apprise contractors of their responsibility to regularly check the website for changes to the guidance at: <https://www.saferfederalworkforce.gov/contractors/>.
- There is the potential for contractor employees or their unions to initiate action to seek relief from compliance with the clause's mandate(s).
  - HCAs and Contracting Officers are reminded of the DOE Contractor Litigation provisions at 10 C.F.R. 719. Questions about 10 C.F.R. 719 may be asked of the local Chief Counsel over the contract or the Assistant General Counsel for Litigation. NNSA Contracting Officers should coordinate with their local NNSA Field Office counsel.
  - HCAs and Contracting Officers learning of impending contract litigation should coordinate with the local Chief Counsel over the contract or, for contracts under the authority of the HCA for Headquarters Procurement Operations, the Assistant General Counsel for Procurement and Financial Assistance. NNSA Contracting Officers should coordinate with their local NNSA Field Office counsel and the NNSA Deputy General Counsel for Procurement, Intellectual Property and Technology Transfer.
  - HCAs and Contracting Officers learning of any labor law-type/Department of Labor action/litigation, should coordinate with the local Chief Counsel over the contract and the Assistant General Counsel for Labor Law. NNSA Contracting Officers should coordinate with their local NNSA Field Office counsel and the NNSA Deputy General Counsel for Procurement, Intellectual Property and Technology Transfer.