

# The Firehouse Lawyer

Volume 19, Number 9E

Be sure to visit [firehouselawyer.com](http://firehouselawyer.com) to get a glimpse of our various practice areas pertaining to public agencies, which include labor and employment law, public disclosure law, mergers and consolidations, financing methods, risk management, and many other practice areas!!!

**Eric T. Quinn, Editor**

**Joseph F. Quinn, Staff Writer**

The law firm of Quinn and Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

Our office is located at:

**7403 Lakewood Drive West, Suite #11  
Lakewood, WA 98499-7951**

Mailing Address:  
**20 Forest Glen Lane SW  
Lakewood, WA 98498**

Office Telephone: 253-590-6628

Email Joe at [joequinn@firehouselawyer.com](mailto:joequinn@firehouselawyer.com)  
Email Eric at [ericquinn@firehouselawyer2.com](mailto:ericquinn@firehouselawyer2.com)

Access and Subscribe to this Newsletter at:  
[firehouselawyer.com](http://firehouselawyer.com)

## Inside this Issue

The Federal Vaccination Mandate

September 2021 Extra

## Executive Order on Mandatory Vaccination

On September 9, 2021, President Joe Biden issued an Executive Order on Ensuring Adequate Safety Protocols for Federal Contractors, which we shall refer to as 14042.<sup>1</sup> The Office of Management and Budget (“OMB”) has issued guidance<sup>2</sup> through the White House that under 14042, *all* employees of federal “contractors”—those who “do business” with the Federal Government, in the words of the OMB—must be fully vaccinated against Covid-19 by December 8, 2021, unless they are deemed *exempt* by the employer and receive reasonable accommodations.

14042 applies to, among other arrangements, any “*contract* or contract-like instrument 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*.”

(emphasis added). But what is a federal “contractor” subject to 14042? The devil is in the details. 14042 directed the Safer Federal Work

<sup>1</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>

<sup>2</sup> <https://www.whitehouse.gov/omb/briefing-room/2021/09/10/ensuring-adequate-covid-safety-protocols-for-federal-contractors/>

# Firehouse Lawyer

Volume 19, Number 9E

September 2021 Extra

Force Task Force (“Task Force”) to issue guidance as to what constitutes a federal “contractor” subject to 14042, no later than September 24, 2021. This has now occurred. The guidance (“Guidance”) is located here: [https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc\\_20210922.pdf](https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf)

The Guidance defines a “contract” very broadly as follows:

An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The term contract includes all contracts and *any subcontracts of any tier thereunder*, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing

(emphasis added). According to the Guidance, 14042 requires full “COVID-19 vaccination of *covered contractor employees*, except in limited circumstances where an employee is legally entitled to an *accommodation*,” by December 8, 2021. (emphasis added). Thus, we must discern who constitutes a “covered contractor employee”

of those who “do business” with the federal government.

The Guidance does not define “employee” so we work from the common law definition<sup>3</sup> of that term, stated very generally: one who is subject to the direction and control of the employer, excluding volunteers and independent contractors.<sup>4</sup> A “covered contractor employee” is defined as “any full-time or part-time employee of a *covered contractor*.” (emphasis added).

The Task Force defined the term “covered contractor” as follows: A “prime contractor or subcontractor [with the Federal Government] at any tier who is party to a *covered contract*.” (emphasis added). A **“covered contract” means “any contract” with the Federal Government.**

And ultimately, again, a “contract” is defined broadly in the guidance, as follows: “An *agreement* between two or more parties [one of whom is the Federal Government] creating obligations that are enforceable or otherwise recognizable at law.”

---

<sup>3</sup> <https://www.irs.gov/businesses/small-businesses-self-employed/employee-common-law-employee>

<sup>4</sup> To be clear, volunteers that are *health care providers* still must be fully vaccinated or have received an exemption from vaccination with accompanying reasonable accommodations, pursuant to Proclamation 21-14.

# Firehouse Lawyer

Volume 19, Number 9E

September 2021 Extra

14042 does not apply to grants.<sup>5</sup> In other words, an agency is not subject to 14042 merely because it receives a SAFER grant or other federal grant funds that take the form of grants. There must be a “contract” between the agency and the Federal Government, whether that agency is a prime contractor or a sub-contractor—i.e. a party that is paid<sup>6</sup> by an intermediary (the prime contractor) such as the state or other municipal corporation having a “contract” with the Federal Government, for services to the general public.

And again, pursuant to the Guidance, “[C]overed contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation.”<sup>7</sup>

Importantly, the Task Force has issued FAQs<sup>8</sup> that state as follows: “In particular, an agency may be required to provide a reasonable accommodation to employees who communicate

---

<sup>5</sup> From 14042 itself: “This order shall not apply to...grants.”

<sup>6</sup> Medicaid funds that are provided to EMS departments as reimbursements for Medicaid transports are not grants. They are “payments for services” pursuant to 42 C.F.R. § 447: <https://www.law.cornell.edu/cfr/text/42/part-447/subpart-A>

<sup>7</sup> Accommodations may be granted based upon disabilities or sincerely held religious beliefs (sound familiar?).

<sup>8</sup> <https://www.saferfederalworkforce.gov/faq/vaccinations/>

to the agency that they are not vaccinated against COVID-19 because of a disability or because of a sincerely held religious belief, practice, or observance.” In other words, your employees can submit exemption requests—if they have not done so already for purposes of obtaining an exemption from Washington State Proclamation 21-14. Many of our clients have already granted such exemptions to the “health care providers” they employ. That will make it easier for them to apply this process to the rest of their employees.

With the above in mind, here are a series of questions that have been asked, and we provide answers to those questions here:

1. My agency received a SAFER grant but has not received any other money from the federal government or otherwise contracted with the federal government. Are we a federal “contractor” subject to 14042? No. 14042 does not apply to grants.
2. My agency issued bonds to build a fire station but has not received any money from the federal government or otherwise contracted with the federal government. Is my agency subject to 14042? No. Although municipal bonds are tax-favored and get special treatment by the IRS, bonds do not constitute federal money: Bonds are tax-favored financial instruments that individual people buy and are reimbursed for with interest.
3. My agency has a written contract with the Veterans Affairs Administration, a federal entity, for the provision of fire protection and EMS to federal property. Is my agency a federal “contractor”? Yes, obviously. This

# Firehouse Lawyer

Volume 19, Number 9E

September 2021 Extra

falls squarely within the definition of a “contract” set forth above.

4. My agency has a past practice of receiving training from the Coast Guard in exchange for a provision of services to federal property. Is my agency a federal “contractor”? Yes. Again, a contract under 14042 is defined as “[A]n *agreement* between two or more parties [one of whom is the Federal Government] creating obligations that are enforceable or otherwise recognizable at law.” Although the arrangement in this case is not reduced to writing, the “course of dealing” between the parties indicates that each have provided benefits to each other, creating expectations and obligations—a contract.
5. I am a fire commissioner. Am I subject to 14042? No. Unless you are specifically defined as an “employee” under 14042 or the Guidance, then you are not an “employee” subject to 14042. Furthermore, elected officials are specifically exempted from the definition of “employee” under numerous laws, including but not limited to the Fair Labor Standards Act and the Federal Family and Medical Leave Act.
6. My agency is paid by the Port of Seattle for services to properties operated by the Federal Aviation Administration that exist on Port of Seattle property. Is my agency a “subcontractor” subject to 14042? Yes. 14042 applies to “subcontractors at any tier,” and your agency, although it is not being paid directly by the FAA, is providing services to the Federal Government, even though you are being paid by a “prime contractor”—the Port

of Seattle—which has a contract with the FAA.

7. I am a fire chief and I do not provide health care services of any kind. Am I subject to 14042? Yes. You are a common law “employee” as you are subject to the direction and control of your employer—the fire commissioners—and you are also an employee under various other laws, including but not limited to the Fair Labor Standards Act.
8. My agency receives reimbursement for ambulance transports through Medicaid and the Washington State Ground Emergency Medical Transport (GEMT) program. Is my agency a federal “contractor” and therefore required to vaccinate all of its employees? Yes. We err on the side of assuming that your agency is “in business” with the federal government, which is sufficient in the eyes of the OMB to confer “contractor” status. Our conclusion is further bolstered by this statement from the White House: “[T]he Centers for Medicare & Medicaid Services (CMS) is taking action to require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement, including but not limited to hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies.”<sup>9</sup>

And of course, to be deemed eligible for GEMT reimbursement, your department must be “enrolled as a medicaid provider for the

---

<sup>9</sup> The quoted language is included here: <https://www.whitehouse.gov/covidplan/>

period being claimed” which typically takes the form of a participation agreement, i.e. a contract. *See* RCW 41.05.730. If a fire department receives funds from the Federal Government, including but not limited to reimbursement from Medicare or Medicaid, you should assume it is a “contractor” *unless* those federal funds come in the form of *grants*.<sup>10</sup> Furthermore, if a fire department has entered into a participation agreement with Washington State in the Medicaid program, that would make the fire department a sub-contractor of the State, which is the agency administering Medicaid, which is funded by federal money.

9. Okay. So our fire department is a “contractor” because we receive fees for ambulance transports via Medicaid or GEMT through a participation agreement, but does that mean that our billing agency’s employees are subject to the vaccine mandate? Until we see further guidance on this, **no**. A covered contractor “employee” means “any full-time or part-time *employee* of a covered contractor working on or in connection with a covered contract.” (emphasis added). We do not view 14042 as being applicable to the billing agency simply by virtue of its arrangement with your department. I say that because employees of the billing agencies are not employees of *your* department. They are employees of an

---

<sup>10</sup> Again, Medicaid funds that are provided to EMS departments as reimbursements for Medicaid transports are not grants. They are “payments for services” pursuant to 42 C.F.R. § 447: <https://www.law.cornell.edu/cfr/text/42/part-447/subpart-A>

independent contractor. They are not subject to the mandate, by virtue of their arrangement with your department, unless they are your employees or work in your facilities. A “subcontractor” provides services to the *Federal Government* by reason of a contract. We would argue that the billing agency provides no such service. The billing agency is in contractual privity with the non-federal agency alone.

10. Does the December 8, 2021 deadline for full vaccination<sup>11</sup> mean that my agency’s health care providers now have until December 8, 2021 to become fully vaccinated (or receive an exemption from vaccination)? **No**. the October 18, 2021 deadline set forth by Proclamation 21-14 is still fully applicable.

**DISCLAIMER. The Firehouse Lawyer newsletter is published for educational purposes only. Nothing herein shall create an attorney-client relationship between Quinn & Quinn, P.S. and the reader. Those needing legal advice are urged to contact an attorney licensed to practice in their jurisdiction of residence.**

---

<sup>11</sup> From the Guidance: “People are considered fully vaccinated for COVID-19 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. There is currently no post-vaccination time limit on fully vaccinated status; should such a limit be determined by the Centers for Disease Control and Prevention, that limit will be considered by the Task Force and OMB for possible updating of this Guidance.”