

Services

Government
Contracts

Labor & Employment

Professional

MICHAEL SCHRIER

WASHINGTON:

202.378.2313

MICHAEL.SCHRIER@

HUSCHBLACKWELL.COM

Georgia Court Blocks Federal Contractor Vaccine Mandate Nationwide

On December 7, 2021, the U.S. District for the Southern District of Georgia, in *Georgia v. Biden*, No. 1:21-cv-163, granted a preliminary injunction that temporarily stayed the Biden administration's vaccine mandate for federal contractors and subcontractors “in any state or territory of the United States of America.” The case was initially brought by Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, and West Virginia. The Associated Builders and Contractors (ABC), a national trade organization, intervened on the side of the plaintiffs. The seven states and ABC requested a preliminary injunction staying Executive Order (EO) 14042 and associated FAR clauses and Guidance, which require federal contractors and subcontractors to have their employees provide proof of vaccination in order to work on or in connection with federal contracts and also impose mask and social distancing requirements. The court granted the preliminary injunction and stayed the federal contractor vaccine mandate nationwide.

The court's order follows a Kentucky federal court's grant last week of a preliminary injunction staying the federal contractor vaccine mandate only in Kentucky, Tennessee, and Ohio. The *Georgia v. Biden* ruling imposes a nationwide preliminary injunction.

The court's reasonings

First, the court found that the states could likely prove that Congress did not clearly authorize President Biden to issue EO 14042 under the Federal Property and Administrative Services Act (FPASA). FPASA authorizes the President to prescribe any policies or directives that he considers necessary to promote “economy” or “efficiency” in federal procurement; however, the court concluded that EO 14042 “goes far beyond addressing administrative and

management issues in order to promote efficiency and economy in procurement and contracting” and practically operates as a regulation of public health, which is not clearly authorized under FPASA. The court further found that states could likely prove that EO 14042 does not have a sufficient nexus to the purposes of FPASA and thus does not fall within the authority actually granted to the President under FPASA.

Second, the court found that the time and effort federal contractors spent on implementing a vaccine mandate in the past (and will spend in the future) constitute irreparable compliance costs resulting from EO 14042.

Third, in balancing the harms, the court found that:

Enjoining EO 14042 would, essentially, do nothing more than maintain the status quo; entities will still be free to encourage their employees to get vaccinated, and the employees will still be free to choose to be vaccinated. In contrast, declining to issue a preliminary injunction would force Plaintiffs to comply with the mandate, requiring them to make decisions which would significantly alter their ability to perform federal contract work which is critical to their operations.

In determining the scope of the injunctive relief, the court concluded that a nationwide injunction is necessary for the full injunctive relief, noting that ABC members are “all over the country.” The court also recognized that because the seven states are involved with federal contracts on a national basis and EO 14042 applies to subcontractors, a nationwide injunction is necessary to avoid creating more confusion.

What this means for federal contractors and subcontractors

A preliminary injunction is issued after plaintiffs establish that they are likely to succeed on the merits but before a court has made a final decision on the merits of the case. Thus, the Georgia court’s grant of preliminary injunction is not a dispositive finding on the substance of the case. The development of the pending case should be closely watched—there is more briefing in the Georgia case on what will likely be cross-motions for summary judgment. Should the court’s final decision mirror its preliminary injunction order, it is very likely that the Biden Administration will appeal to the U.S. Court of Appeals for the Eleventh Circuit. In other words, there is likely still a long way to go in the legal challenges against EO 14042.

In the meantime, because of the nationwide scope of the preliminary injunction, the Biden administration’s federal contractor vaccine mandate is on hold. The January 18, 2022 compliance deadline is likely ineffective, for now, because the Government cannot “enforce” the vaccine mandate.

Federal contractors and subcontractors should also note that neither this Georgia decision nor the prior Kentucky decision addressed EO 14042's other requirements, such as masking, social distancing, or responsible person requirements. The court enjoined only "the vaccine mandate." Because masking and distancing were not mentioned, presumably those aspects of EO 14042 are not enjoined. But this is unclear at this time. Federal contractors and subcontractors are advised to follow those other requirements to the extent they appear in their contracts and are not inconsistent with applicable state or local law.

Contractors and subcontractors should also be on the lookout for additional guidance from the Government. Shortly after the court's decision in *Georgia v. Biden*, the U.S. General Services Administration issued guidance stating:

Update: On December 7, 2021, the United States District Court for the Southern District of Georgia issued a preliminary injunction . . . which halts enforcement of the vaccine mandate for contractors and subcontractors nationwide.

What does this mean?

Effective immediately, the Federal Government is prohibited from enforcing a vaccine mandate for contractors and subcontractors **in all states and territories of the United States. GSA contracting officers shall not take any action to enforce** the vaccination requirements in FAR clause 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors in any contract or contract-like instrument.

What does it mean to "not enforce" the clause?

Contractor and subcontractor employees do not have to meet the vaccination mandate in the Safer Federal Workforce Task Force Guidance

Contractors will continue to be eligible for new contracts, new orders, options, and extensions even if they have not agreed to follow FAR clause 52.223-99.

Additional updates will be posted once more information is available.

In response to the prior Kentucky court's narrower injunction, the Office of Management and Budget, as reflected in directives such as an updated U.S. Department of Defense Class Deviation, directed agencies to exempt and halt the application of the EO 14042 FAR (DFARS) clause to solicitations and contracts that will be performed in whole or in part of the three affected states. If OMB issues similar directives in response to this new nationwide injunction, agencies may cease efforts to insert new contract clauses or enforce clauses already incorporated into federal contracts pending a final resolution of the ongoing litigations.

Federal contractors and subcontractors should also keep in mind that the Georgia court's order only applies to the federal government. The court order does not prohibit contractors and subcontractors from voluntarily complying with EO 14042, or flowing down the clauses to lower tier subcontractors, as long as they also comply with applicable state and local law.

Finally, contractors and subcontractors should pay attention to potential duties to bargain with unions over voluntary vaccine requirements because continuing to comply with EO 14042 while under the preliminary injunction could create complications for a company's collective bargaining obligations. When the vaccine requirement was a legal obligation, employers likely only had, at most, an obligation to bargain over the impact and implementation of the legal requirement. Now that EO 14042 has been enjoined and temporarily is not a legal obligation, imposing a vaccine mandate on bargaining unit employees may become fully subject to collective bargaining.

Contact us

We expect many fast-moving changes in this case and other federal cases across the country challenging the legality of the federal contractor COVID guidance and contract clauses. We will be updating as developments warrant. In the meantime, please contact Michael Schrier or your Husch Blackwell attorney.

Your comprehensive COVID-19 legal resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.