

Federal Contractor Vaccine Mandate: Federal Appeals Court Says It's Unlawful But You Might Have to Comply Anyway

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Lately, litigation news related to public and private workplace COVID-19 vaccine mandates has quieted. That changed last Friday, when the Eleventh Circuit Court of Appeals narrowed a nationwide injunction against the Biden Administration's federal contractor vaccination mandate (the "GovCon Vax Mandate"). Because the Court concluded that the GovCon Vax Mandate was likely an unlawful exercise of authority, it kept in place a lower court preliminary injunction against enforcement of the mandate. But, the decision reversed the lower court's *nationwide* injunction, substantially narrowing the injunction's affect. That means federal contractors that were not parties to the Eleventh Circuit litigation are potentially *subject* to the GovCon Vax Mandate. For those contractors, the focus now turns back to the federal government—and whether the Biden Administration will start to enforce the mandate piecemeal. The Safer Federal Workforce Task Force issued the GovCon Vax Mandate. As of this eUpdate, the Task Force's website still indicates that, in light of various court orders and preliminary injunctions, the Government will take no action to enforce the GovCon Vax Mandate. Whether that will change in light of the Eleventh Circuit's decision remains unknown, creating significant operational uncertainty for organizations with federal contracts or subcontracts.

The GovCon Vax Mandate

By way of brief background, on September 9, 2021, the Biden Administration announced its COVID-19 Action Plan, which outlined a six-pronged approach to combat the pandemic. Among other things, the Action Plan required all federal workers and certain employees of federal contractors and subcontractors to be fully vaccinated against COVID-19, with no weekly testing option as an alternative. On September 30, 2021, the Federal Acquisition Regulation ("FAR") Council issued a memorandum outlining the details of the GovCon Vax Mandate, and contracting agencies thereafter began (if unevenly) rolling out modifications to federal contracts to include new contract clauses requiring contractor compliance. This included requiring compliance with the GovCon Vax Mandate. See, e.g., FAR 52.223-99 and DFARS 252-223-7999.

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The Georgia Litigation

The mandate was swiftly met with legal challenges from both trade associations and attorneys general across the country, resulting in a piecemeal of legal arguments, legal rulings, and preliminary injunctions. The case at issue in the Eleventh Circuit's ruling last Friday is *Georgia, et al. v. Biden, et al.* Given the Court's ruling, the parties to the case are important. The plaintiffs are:

- The states of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, West Virginia;
- Georgia Governor Brian P. Kemp, Idaho Governor Brad Little, South Carolina Governor Henry McMaster;
- The Board of Regents of the University System of Georgia;
- Georgia Department of Agriculture Commissioner Gary W. Black;
- The Alabama Department of Agriculture and Industries, Alabama Department of Public Health, Alabama Department of Rehabilitation Services, and Idaho State Board of Education; and
- Associated Builders and Contractors, Inc. and one of its chapters, Associated Builders and Contractors of Georgia, Inc.

The plaintiffs initially asked a District Court in the Southern District of Georgia to issue a preliminary injunction. On December 7, 2021, the Georgia District Court granted the motion for a preliminary injunction. The preliminary injunction was not, however, limited to the plaintiffs listed above. Rather, the Court prohibited the government defendants from enforcing the federal contractor and subcontractor vaccine mandate in *any state* in the country.

The federal government appealed the nationwide preliminary injunction, and the Eleventh Circuit's most recent ruling significantly altered the District Court's ruling. The appeals court *upheld* the preliminary injunction "to the extent that it enjoins federal agencies from enforcing the mandate against the plaintiffs—the seven plaintiff States and their agencies and members of Associated Builders and Contractors—and to the extent that it bars the federal government from considering a bidder's compliance with the mandate when deciding whether to grant a contract to a plaintiff or to a nonparty bidder." However, the appeals court *reversed* the nationwide preliminary injunction such that "the federal government is no longer enjoined from enforcing the mandate in new and existing procurement contracts between the federal government and nonparties, or in the selection process following solicitations in which no plaintiff participates as a bidder."

That means that the federal government *cannot* currently enforce its vaccine mandate against the plaintiffs, which are the states of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, West Virginia; Georgia Governor Brian P. Kemp, Idaho Governor Brad Little, South Carolina Governor Henry McMaster; The Board of Regents of the University System of Georgia; Georgia Department of Agriculture Commissioner Gary W. Black; The Alabama Department of Agriculture and Industries, Alabama Department of Public Health, Alabama Department of Rehabilitation Services, and Idaho State Board of Education; and Associated Builders and Contractors, Inc. and Associated Builders and

Contractors of Georgia, Inc.

But that's not the end of the analysis, and the Court's holding makes things very complicated for federal contractors.

Certainty for the Parties—But Confusion for Everyone Else

While it may seem that the federal government can, therefore, enforce its vaccine mandate in contracts involving any non-plaintiff to the Georgia litigation, that is not necessarily true. Other courts have enjoined enforcement of the GovCon Vax Mandate in specific states or for specific parties:

- *Missouri v. Biden*, 576 F. Supp. 3d 622 (E.D. Mo. 2021) (enjoining enforcement against plaintiff States Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, and Wyoming; scheduled for oral argument before the Eighth Circuit Court of Appeals on September 21, 2022);
- *Louisiana v. Biden*, 575 F. Supp. 3d 680 (W.D. La. 2021) (enjoining enforcement against plaintiff States Louisiana, Mississippi, and Indiana, and their agencies; scheduled for oral argument before the Fifth Circuit Court of Appeals on October 3, 2022);
- *Kentucky v. Biden*, 571 F. Supp. 3d 715 (E.D. Ky. 2021) (enjoining enforcement in “all covered contracts in Kentucky, Ohio, and Tennessee;” argued before the Sixth Circuit Court of Appeals on July 21, 2022); and
- *Florida v. Nelson*, 576 F. Supp. 3d 1017 (M.D. Fla. 2021) (currently pending on appeal in the Eleventh Circuit, in which the district court entered a preliminary injunction enjoining enforcement of the mandate in Florida).

Some of these courts have enjoined enforcement only when the contract is performed in certain states. Where a federal contract is performed is not always a straightforward analysis. Though traditionally the applicable state is the place in which the contracted work is performed, the possibility for inconsistent standards is high.

For example, if the State of Georgia has a federal contract, the GovCon Vax Mandate would not apply to the State of Georgia employees working on the federal contract. But if a private party was performing that federal contract (even in Georgia), then the federal government could direct the private party to comply with the GovCon Vax Mandate—at least until that private party sued and sought its own injunction. Because there are any thousands of federal contractors in the United States, a significant amount of litigation and expense will result if each one must independently seek relief from the GovCon Vax Mandate in the judicial system.

Looking Ahead

In light of the multiple federal court decisions striking down the vaccination mandate as beyond President's Biden executive powers, a clear way to sort through what appears to be a legal mess is for the Safer Federal Workforce Task Force to update its guidance in light of the Eleventh Circuit's ruling to express that it will not enforce the GovCon Vax Mandate against *any* federal contractor. Given the Administration's loosening of COVID-related restrictions and recent CDC guidance, it is certainly possible that the Safer

Federal Workforce Taskforce will move away from a vaccine mandate altogether, thereby mooted contractor compliance concerns. For example, after U.S. Supreme Court struck down OSHA's Emergency Temporary Standard (ETS) that included a vaccinate-or-test requirement for large employers (also part of the Biden Administration's COVID-19 Action Plan), OSHA withdrew the ETS, though left the door open by not withdrawing the ETS as a proposed rule. OSHA's last update on the issue was January 25, 2022. As of the date of this eUpdate, it remains to be seen whether the Safer Federal Workforce Taskforce will take a similar path.

As a final note, we suspect that in light of the Eleventh Circuit's partial lift of the nationwide injunction, the list of states in which the mandate is not preliminarily enjoined will shrink, and that other states, private organizations, or even individual contractors, will bring their own lawsuits to enjoin enforcement. In other words, quiet time might be over when it comes to the federal contractor and subcontractor COVID-19 vaccine mandate, and federal contractors should re-assess their approach to this issue and compliance strategies based on the (ever) changing legal landscape.