

Judge Blocks COVID-19 Vaccine Mandate Nationwide for Federal Contractors; OMB Issues Guidance

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A Georgia federal district court judge has issued a preliminary nationwide injunction halting enforcement of Executive Order (EO) 14042, “Ensuring Adequate COVID Safety Protocols for Federal Contractors.” [*Georgia v. Biden*](#), No. 1:21-cv-163 (S.D. Ga. Dec. 7, 2021).

EO 14042 requires federal contractors and subcontractors with certain covered contracts ensure their covered employees are fully vaccinated against COVID-19 by January 18, 2022, among other requirements.

The court Order states:

Accordingly, the Court ORDERS that Defendants are ENJOINED, during the pendency of this action or until further order of this Court, from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in any state or territory of the United States of America.

U.S. District Court Judge R. Stan Baker found:

it necessary, in order to truly afford injunctive relief to the parties before it, to issue an injunction with nationwide applicability.

The case was initially filed by the states of Alabama, Georgia, Idaho, Kansas, South Carolina, Utah, and West Virginia. However, Associated Builders and Contractors, Inc., a nationwide trade organization “representing tens of thousands of contractors and subcontractors that regularly bid on and work on federal contracts for services” petitioned to intervene in the suit and joined the states in their request for a preliminary injunction.

Judge Baker found:

The Court finds that Plaintiffs have a likelihood of proving that Congress, through the language it used, did not clearly authorize the President to issue the kind of mandate contained in EO 14042, as EO 14042 goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting, and instead, in application, works as a regulation of public health, which is not clearly authorized under the Procurement Act.

He continued, “Plaintiffs have a likelihood of proving that EO 14042 does not have a sufficient nexus to the purposes of the Procurement Act and thus does not fall within the authority actually granted to the President in that Act.”

The Order follows the [order of a Kentucky federal court](#)’s preliminary injunction on the enforcement of the Executive Order EO 14042 in Kentucky, Ohio, and Tennessee. [*Commonwealth of Kentucky v. Biden*](#), No. 3:21-cv-00055 (E.D. Ky. Nov. 30,

2021).

The court orders in both cases will be appealed to their respective courts of appeal, the U.S. Courts of Appeals for the 11th and Sixth Circuits. Ultimately, the question of the legality of EO 14042 likely will be petitioned to the U.S. Supreme Court. In light of these preliminary injunctions, the Office of Management and Budget issued updated [Guidance](#) stating the government will take no action to enforce the clause implementing requirements of EO 14042, absent further written notice from the agency, where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the EO.

For contractors that already have accepted contract or subcontract modifications with the requirement or may see the FAR Clause in future solicitations or contracts, it is unlikely (but possible) some agencies may take the position that clients should keep moving on requirements even though not legally enforceable.

Contractors may want to consider:

- While the FAR clause is in a contract, communicating with the contracting agency to confirm the contractor will treat the requirement as on-hold until or unless the injunction is lifted.
- Staying on the lookout for communications, modifications, inclusion of the requirement in solicitations and new contract awards from agencies and prime contractors, and being prepared to push back regarding acceptance of the FAR clause or any contracting agency attempts at directing compliance even though the EO is not currently enforceable.

Contractors also should be mindful of existing or new customer requirements or government site access requirements for vaccination or testing that are separate from EO 14042.

Contractors already partially or nearly fully in compliance with EO 14042 will want to consider:

- Whether to institute a complete stop or move forward based on the employer's own business decision to require vaccinations (with legally required exemptions); and
- If moving forward, consider allowing more time for accommodations decisions and employment actions related to employees who are not vaccinated or who do not request or are denied accommodations.

Contractors moving forward with vaccination programs must be particularly mindful, however, of the dozen or so state laws that do or may conflict with the requirements of EO 14042, now that enforcement has been enjoined.

Federal contractor employers with covered contracts should be ready to turn back on compliance efforts and meeting deadlines (making good faith efforts to do so) if or when injunctions are lifted. New compliance deadlines are expected if the injunctions are lifted.

Finally, contractors should provide clear communications to employees about these developments, and any changes in direction or timelines as a result of the injunctions, and the employer's decisions on further vaccination efforts in response.

Please contact a Jackson Lewis attorney with any questions.

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