

Nationwide Injunction Against Federal Contractor COVID-19 Vaccine Mandate Overturned

By Patricia Anderson Pryor & Laura A. Mitchell

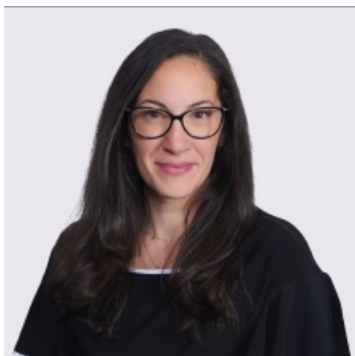
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Meet the Authors



Patricia Anderson Pryor

Office Managing Principal
513-322-5035
Patricia.Pryor@jacksonlewis.com



Laura A. Mitchell

(She/Her)
Principal
303-225-2382
Laura.Mitchell@jacksonlewis.com

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The U.S. Court of Appeals for the Eleventh Circuit has issued its Order overturning the [nationwide injunction](#) issued by the U.S. District Court for the Southern District of Georgia in *Georgia v. Biden* against the federal contractor COVID-19 vaccine mandate, but keeping the injunction in place for the plaintiff parties. [Georgia, et al. v. President of the United States, et al.](#), No. 21-14269 (11th Cir. Aug. 26, 2022).

What does this ruling mean for federal contractors nationwide?

Background

President Joe Biden enacted [Executive Order 14042](#) (EO 14042) to require covered federal contractors and subcontractors to provide certain COVID-19-related safeguards for their workforce. Pursuant to EO 14042, the Safer Federal Workforce Task Force published [Guidance](#) that required covered contractors and subcontractors to implement the following COVID-19 protocols:

- Masking and physical distancing requirements while in contractor workplaces;
- Designation of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces; and
- COVID-19 vaccination of covered contractor employees, subject to legal accommodations.

Legal Challenges

Various legal challenges to EO 14042 were raised, particularly concerning the COVID-19 vaccination requirements.

Six injunctions prohibiting the enforcement of EO 14042 were issued. They covered the following 18 states and nationwide:

1. Arizona (any contracts principally performed in Arizona or where any contracting party is domiciled or headquartered in Arizona);
2. Florida;
3. Kentucky, Ohio, and Tennessee;
4. Alaska, Arkansas, Iowa, Missouri, Montana, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming;
5. Louisiana, Indiana, and Mississippi (only prohibiting enforcement in contracts between the *states* and the federal government, *not* between *private federal contractors* and the federal government); and
6. Nationwide (in the *Georgia* case).

Because of the nationwide scope of the injunction issued in *Georgia*, various other challenges to EO 14042 were stayed pending the ultimate result of appeals of the *Georgia* injunction.

Decision Regarding Nationwide Injunction

The *Georgia* nationwide injunction was appealed to the Eleventh Circuit, which heard oral arguments in April 2022. The court upheld the injunction, but limited its scope to only the plaintiff parties, *i.e.*, the states of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, West Virginia (the states *themselves*, not companies located or contracts performed therein); the seven states' agencies; and the members of the trade association Associated Builders and Contractors (ABC). The court further stated that, if any plaintiff is a bidder on a given federal contract opportunity, the federal government may not consider compliance or non-compliance with the COVID-19 vaccine requirement *for any bidders* when making its contract award decision.

In upholding the injunction as to the plaintiffs, the court based its decision on a finding that Congress never authorized the president (or executive agencies) under the Procurement Act to "set baseline health and safe qualifications for contractors – standards that would apply regardless of the specific needs in a given project." The court focused on two specific provisions of the Procurement Act. The first, § 121(a), provides that the "President may prescribe policies and directives that the President considers necessary to carry out this subtitle. The policies must be consistent with this subtitle." 40 U.S.C. § 121(a). The second is the Procurement Act's statement of purpose: "to provide the Federal Government with an economical and efficient system for" procurement and contracting functions. 40 U.S.C. § 101. The court rejected the government's argument that the purpose statement *itself* constituted a source of authority. Rather, the court held that § 121 was the sole source of authority by which the constitutionality of EO 14042 should be judged and that the purpose provision was a restriction on the president's authority, rather than an expansion.

The court also emphasized that, when Congress intended to further economic or social policies through the procurement process, Congress passed specific legislation to do so. Here, Congress did not do that, which the court said weighed against a finding of a grant of authority by Congress to the president. The Court contrasted that against other situations where the president has enacted procurement requirements, such as anti-discrimination requirements for contractors. It noted that, in cases addressing the constitutionality of anti-discrimination orders, courts found presidential authority based upon some combination of the grant of authority from the Procurement Act *and* some separate statutory basis (*e.g.*, Title VII of the Civil Rights Act). The court noted the lack of secondary statutory authority to institute vaccine mandates as a separate basis for why the president did not have the authority to issue EO 14042.

What Does This Mean for Your Business?

If you are a contractor or subcontractor for any contract covered by any of the injunctions covering the 18 states listed above, or are an ABC member in any state, the COVID-19 vaccination requirement remains unenforceable.

If you are a contractor or subcontractor for any other contract, the situation is less clear. There are 13 separate cases (including in Alabama, Michigan, Texas, and Utah) that were put on hold pending the *Georgia* decision. Additionally, there are 13 additional ongoing cases challenging EO 14042 (including in Alabama, the District of Columbia, Michigan, Mississippi, New Jersey, New Mexico, Oklahoma, Texas, Virginia, and Washington). Now, it is likely that the activity and decisions in these cases will be expedited, which could result in further patchwork injunctions of EO 14042. The Eleventh Circuit's decision provides a road

map for future courts to similarly enjoin EO 14042. Until that occurs, however, COVID-19 vaccination requirements are technically enforceable and may be inserted into federal contracts in the remaining 32 states or the District of Columbia, except for contracts awarded to ABC members. This result seems inherently unworkable and may spur other trade associations to challenge EO 14042 so that their members receive the same benefit as ABC's members.

For these reasons, it is unclear whether the Biden Administration will direct contracting agencies to insert vaccination requirements into new or renewed federal contracts or otherwise enforce EO 14042 in current contracts with the requirement, particularly in light of the overall decision by the Eleventh Circuit as to the merits of the claim. As of this writing, the [Safer Federal Workforce's website](#) states that it will not enforce EO 14042 "where the place of performance identified in the contract is in a U.S. state or outlying area subject to a court order" enjoining EO 14042. It further states that the federal government *will enforce* EO 14042 "in all other circumstances." The website still lists the "fifty States" as areas where the EO is enjoined, which likely will be updated shortly.

We will keep a close eye on any further statements from the federal government that reflect its plans to enforce – or not enforce – EO 14042 in light of the nationwide injunction being lifted.

If you have any questions regarding how your company should proceed given the *Georgia* ruling, please contact any of the authors of this article or the Jackson Lewis attorney(s) with whom you regularly work.

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