

# Executive Order 14042 Is Preliminarily Enjoined Nationwide: The Third Domino Falls

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Like the [Occupational Safety and Health Administration's \(OSHA\) emergency temporary standard \(ETS\)](#) and the [Centers for Medicare and Medicaid Services' \(CMS\) healthcare rule, Executive Order \(EO\) 14042](#) (including its related task force guidance, answers to frequently asked questions, and interim contract clause) has been preliminarily enjoined nationwide. United States District Judge R. Stan Baker of the Southern District of Georgia issued an order on December 7, 2021, stopping the enforcement of President Biden's workplace safety protocols for federal contractors and subcontractors, effective immediately. According to Judge Baker, "[p]laintiffs will likely succeed in their claim that the President exceeded the authorization given to him by Congress ... when issuing Executive Order 14042."

Among the highlights of the order are the following:

- The court readily found that the plaintiffs showed a substantial likelihood of success on the merits, that an injunction is necessary to prevent irreparable injury, that the threatened injury outweighs the harm of the injunction, and that an injunction would not be adverse to the public interest. Specifically, Judge Baker noted that the court was "unconvinced" that Congress clearly authorized President Biden to issue the directives contained in EO 14042 and found that "EO 14042 goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting and instead ... works as a regulation of public health." In other words, EO 14042 is not sufficiently related to the purposes of the Federal Property and Administrative Services Act (the Procurement Act), and thus the directives contained in the executive order were not authorized by the Procurement Act.
- The court found that witness testimony about the time and effort spent on compliance efforts since September 9, 2021, and going forward, constitute compliance costs resulting in irreparable harm and that declining to issue a preliminary injunction would force the plaintiffs to comply with the mandate and could, among other things, financially impact plaintiffs.
- The court declined to rule on the plaintiffs' claim that the issuance of the task force guidance and interim Federal Acquisition Regulation (FAR) clause violated the Administrative Procedure Act's notice-and-comment requirements. The court did not issue any

determination on the plaintiffs' claim that EO 14042 is unconstitutional under the non-delegation doctrine. Finally, neither the Georgia decision nor the prior [Kentucky decision](#) addressed EO 14042's other requirements, such as masking or social distancing.

- Nevertheless, the court determined that an injunction with nationwide applicability was the only option given the plaintiffs involved, the number of contracts with which the plaintiffs are involved, and the fact that EO 14042 applies to subcontractors. Consequently, the court ordered that the Biden administration is **"enjoined until further order of the 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."** (Emphasis added.)

## What's Next?

This decision will almost certainly be appealed. (Last week's Kentucky decision has been appealed to the Sixth Circuit Court of Appeals and the Justice Department has asked the judge to stay his order until the appeal is resolved.) We also expect orders in similar challenges seeking to enjoin EO 14042 that are winding their way through the litigation pipeline. Services contractors and subcontractors may want to keep a close eye on these impending decisions, as well as legal challenges under OSHA's ETS and the CMS healthcare rule, both of which have been preliminarily enjoined, like EO 14042.

Federal contractors should keep in mind that the preliminary injunction does not prohibit voluntary compliance with EO 14042; it merely prevents the federal government from enforcing the requirements of the executive order. Contractors that decide to voluntarily engage in a vaccine mandate should be aware of state laws that prohibit or limit vaccine mandates as well as potential duties to bargain with unions over voluntary vaccine requirements. Contractors that have already signed contract modifications should communicate with their contracting officers to understand the impact of this nationwide preliminary injunction on their contract obligations.

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