

Georgia Federal Court Enjoins the Government from Enforcing the Federal Contractor Vaccine Mandate

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On December 7, 2021, the federal district court for the Southern District of Georgia (the Court) issued a preliminary injunction preventing the government from enforcing the vaccine mandate for federal contractors and subcontractors set forth in Executive Order 14042, in all covered contracts in any state or territory of the United States of America. This court order enjoined the only remaining vaccine mandate implemented under the Biden Administration's plan for leading the country out of the COVID-19 pandemic. Notably, (i) on November 6, 2021, the Fifth Circuit [ordered](#) that the Occupational Safety and Health Administration (OSHA) halt enforcement of its Emergency Temporary Standard (ETS), requiring large employers of 100 or more employees to mandate COVID-19 vaccinations or weekly testing, and (ii) on November 30, 2021, the U.S. District Court for the Western District of Louisiana issued a [nationwide injunction](#) of the Centers for Medicare and Medicaid Services (CMS) COVID-19 vaccine mandate. For more information about the OSHA ETS and CMS injunctions, view the Foley article available [here](#).

The Georgia order enjoins only federal enforcement of the COVID-19 vaccine mandate contract clause; it does not, by its terms, prohibit government contractors from voluntarily complying with the requirements of the clause by imposing a vaccine mandate on their employees. However, government contractors that seek to enforce COVID-19 vaccine mandates on their workforce must take into account state laws that have banned vaccine mandates or placed limits on vaccine mandates. Furthermore, because the Court's order is only a preliminary injunction, the ultimate merits of the challenges to Executive Order 14042 have not yet been determined, raising the possibility that the injunction could be contested by the government in the coming weeks and ultimately lifted or stayed. Thus, government contractors now face a difficult choice as to whether to

continue with the vaccine mandates they have implemented, to comply with the requirements of their covered contracts, or to halt such actions pending final resolution of the litigation challenging the federal contractor vaccine mandates.

Summary of the Georgia Order

On October 29, 2021, the states of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, and West Virginia; the governors of several of those states; and various state agencies sought declaratory and injunctive relief against the requirements of Executive Order 14042. Associated Builders and Contractors, Inc. (ABC), a trade organization, further sought to intervene in this suit and obtain injunctive relief for its members. In considering these requests, the Court reiterated the Eastern District of Kentucky's sentiment from a similar case dated November 30, 2021, that enjoined the federal contractor vaccine mandate in Ohio, Tennessee, and Kentucky. The Court noted that the effectiveness of the available vaccines is not at issue and recognized the "tragic toll that the COVID-19 pandemic has wrought throughout the nation and the globe." *Georgia v. Biden*, No. 1:21-cv-163, at *2 (S.D. Ga., Dec. 7, 2021) (citing *Kentucky v. Biden*, No. 3:21-cv-55, 2021 WL 5587446, at *9 (E.D. Ky. Nov. 30, 2021)). Yet ultimately the "Court [determined that it] must preserve the rule of law and ensure that all branches of government act within the bounds of their constitutionally granted authorities." *Id.* In short, the Court viewed the federal contractor vaccine mandate as an overreach.

The Court held that the plaintiffs have a likelihood of proving that the Federal Property and Administrative Services Act "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 Act]." *Id.* The Court ultimately determined that the plaintiffs "will likely succeed in their claim that the President exceeded the authorization given to him by Congress through the Federal Property and Administrative Services Act when issuing Executive Order 14042." *Id.* The Court declined to limit the application of the injunction to the Southern District of Georgia or states in the Eleventh Circuit based on the request for relief on behalf of ABC's members, which are located throughout the United States.

Impact of the Order on Federal Contractors

The injunction prevents the government from *enforcing* the requirements of Executive Order 14042 until the Court reaches a decision on the merits or otherwise issues an order pertaining to the stay. On its face, it does not prevent the government from continuing to include FAR clause 52.223-99, or another deviation implementing Executive Order 14042, into federal prime contracts. Further, the stay does not expressly prevent prime contractors from continuing to include such clauses in subcontracts.

Notably, following the preliminary injunction issued by the Eastern District of Kentucky, the Department of Defense issued a [class deviation](#) directing Contracting Officers to cease including DFARS 252.223-7999 in solicitations and contracts that "may be performed, at least in part, in Kentucky, Ohio, and/or Tennessee." Rather than ceasing to include the FAR clause in its contracts, GSA added a statement to its [website](#) indicating that "GSA will not take any action to enforce FAR clause 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors in all covered contracts or contract-like instruments being performed, in whole or in part, in Kentucky, Ohio, and Tennessee."

It remains unclear how agencies will respond to this nationwide stay of the vaccine mandate, and whether they will cease including the FAR/DFARS clauses in solicitations and contracts, or if they will continue to include the clauses but cease enforcement of the clauses. The latter approach leaves contractors at risk of being held to compliance with the FAR/DFARS clause in existing contracts — and potentially facing consequences for non-compliance — should the government ultimately prevail in the litigation and have the injunction lifted.

Next Steps for Federal Contractors

Contractors should closely monitor announcements by federal government agencies responding to this injunction. In the meantime, federal prime contractors and subcontractors should continue to carefully review solicitations, contracts, and contract modifications to determine if the federal government or higher-tiered contractors are incorporating FAR/DFARS vaccine clauses (e.g., FAR 52.223-99 and DFARS 252.223-7999), thereby making the contractor a “covered contractor” under Executive Order 14042 and the Safer Federal Workforce [Task Force Guidance](#). If the injunction is lifted, covered contractors will need to continue to comply with the Task Force Guidance, and it is unclear at this time whether and to what extent the government will extend the timeframe for compliance. For compliance obligations of covered contractors, review [our prior article here](#).

Companies also are free to comply voluntarily with the federal contractor vaccine mandate and Task Force Guidance but should seek legal advice before imposing vaccine mandates on employees located in states with countervailing legislation.

Companies that want to avoid becoming a covered contractor can and should seek the removal of the FAR/DFARS vaccine mandate clauses in solicitations, contracts, and contract modifications based on the current injunction.

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