

Narrower Vax Mandate Block Muddles Contractor Compliance

By **Matthew Haws, Sati Harutyunyan and Ishan Bhabha**

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On Aug. 26, the U.S. Court of Appeals for the Eleventh Circuit brought back to life complicated legal, management and labor issues related to COVID-19 vaccine requirements for many government contractors.

By significantly narrowing a nationwide injunction, its decision in *Georgia v. President of the United States* leaves behind a half dozen different injunctions, a complicated patchwork with significant uncertainty for contractors.

The Eleventh Circuit's decision narrows the December 2021 order of the U.S. District Court for the Southern District of Georgia enjoining nationwide enforcement of the Biden administration's COVID-19 vaccine mandate for federal contractors.

The district court's decision — issued just weeks before the Jan. 18 deadline for contractor compliance — effectively halted enforcement of the vaccine mandate "for federal contractors and subcontractors in all covered contracts in any state or territory of the United States of America."

Already dealing with inflation, workforce and supply chain challenges, many contractors appeared to welcome the reprieve. But the straightforward relief provided by the nationwide injunction disappeared last week, when the Eleventh Circuit's three-judge panel issued its opinion in the Biden administration's appeal of the district court order.

The divided panel agreed with the court below that the plaintiffs were entitled to an injunction, but it disagreed — unanimously — that a nationwide injunction was appropriate. On that basis, the court vacated the injunction "to the extent that it bars enforcement of the mandate against nonparty contractors through new and existing contracts."

The practical effect of this decision is that it leaves government contractors facing a complicated and unwieldy landscape of party-specific and state-specific injunctions.

Here are the three things every government contractor is asking:



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- What did the Eleventh Circuit hold?
- What is the status of the contractor vaccine mandate following this decision?
- What should I be doing now?

What did the Eleventh Circuit hold?

The Eleventh Circuit's substantive holding on the authority of the president to issue a vaccine mandate is what many expected and echoes the reasoning of other courts enjoining the vaccine mandate.

Focusing on the first element required for a preliminary injunction — whether the plaintiff is likely to succeed on the merits — the court held that the Federal Property and Administrative Services Act, or Procurement Act, does not provide the president with authority to issue direction of the type found in the vaccine mandate.

The court began by noting that the federal government has broad power to "fix the terms and conditions upon which it will make needed purchases. ... But that authority rests in Congress's hands in the first instance — not the President's."^[1]

The court then focused on whether Congress authorized the president to make procurement agreements contingent on COVID-19 vaccination.^[2] It concluded that Congress granted no such authority.

The Eleventh Circuit directly challenged the expansive interpretation of the Procurement Act by the U.S. Court of Appeals for the District of Columbia Circuit in a line of cases beginning with the 1979 decision in *AFL-CIO v. Kahn*.

In *Kahn*, the court held that the president could issue an executive order requiring contractors to comply with wage and price standards because the Procurement Act granted the president "particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole."^[3]

The Eleventh Circuit concluded that the *Kahn* decision should not be read to give the president a blank check or "near-limitless executive procurement authority."^[4]

Specifically, the court stated that the broad preamble language does not grant the president authority, but only informs the use of the specific grants of authority elsewhere in the Procurement Act: "The purpose the Act serves is, if anything, a secondary restriction on the President's authority rather than an expansion."

Finding that nothing in the act delegated the power to require widespread vaccination, the court found that "all signs suggest that Congress retained that power rather than passing it on."^[5]

In so doing, the majority opinion further developed recent law applying the major questions doctrine to the Procurement Act: rejecting reliance on the purpose statement of the Procurement Act and demanding a clear substantive grant of authority to the president or a subordinate official.

Federal Contractor Vaccine Mandate Challenged in Court Preliminary injunctions remain in effect in these cases, determining the current scope of the vaccine mandate.

Georgia v. Biden

U.S. District Court for the Southern District of Georgia, 2021

Scope: Enjoined as to contracts with plaintiffs.

The decision preliminarily enjoins the Biden administration from enforcing the mandate with respect to contracts with the six plaintiff states — Alabama, Georgia, Idaho, Kansas, South Carolina, Utah and West Virginia — or in contracts with members of plaintiff Associated Builders and Contractors.

Louisiana v. Biden

U.S. District Court for the Western District of Louisiana, 2021

Scope: Enjoined as to contracts with plaintiffs.

The decision preliminarily enjoins enforcement of the mandate with respect to contracts between plaintiff states Louisiana, Mississippi and Indiana, and their agencies. It expressly does not extend to "contracts between private contractors and the national government." An appeal has been filed.

Florida v. Nelson

U.S. District Court for the Middle District of Florida, 2021

Scope: Enjoined as to contracts in Florida.

The district court entered a preliminary injunction enjoining the Biden administration from enforcing the mandate in Florida. An appeal has been filed.

Brnovich v. Biden

U.S. District Court for the District of Arizona, 2022

Scope: Enjoined as to contracts in Arizona.

The district court entered a preliminary injunction as to contracts in "the geographic boundaries of the state of Arizona" but refused to apply the nationwide scope sought by the plaintiffs.

Kentucky v. Biden

U.S. Court of Appeals for the Sixth Circuit, 2022

Kentucky v. Biden

U.S. District Court for the Eastern District of Kentucky, 2021

Scope: Enjoined as to contracts in certain locations.

The decision preliminarily enjoins enforcement in "all covered contracts in Kentucky, Ohio, and Tennessee." The Sixth Circuit subsequently denied the Biden administration's request to stay the injunction pending appeal.

Missouri v. Biden

U.S. District Court for the Eastern District of Missouri, 2021

Scope: Enjoined as to contracts in certain locations.

The decision preliminarily enjoins the Biden administration from enforcing the vaccine mandate for contracts performed in plaintiff states — Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota and Wyoming. An appeal has been filed.

This is one of the first opinions to interpret the U.S. Supreme Court's June decision in *West Virginia v. U.S. Environmental Protection Agency*, a decision that is expected to have a potentially significant impact on the ability of administrative agencies to act on the outskirts of their authority.

Notably, the U.S. Court of Appeals for the Third Circuit's concurring opinion concurs only in the result and the dissenting opinion differs markedly both in the outcome and the application of the major questions doctrine.

Two additional things are also worth noting.

First, the court rejected the argument that it should interpret the Procurement Act broadly because of the history of executive orders based on a broad interpretation of their authority. This line of discussion may hint at future challenges to a range of past executive orders.

Second, the court noted that "until a final decision is reached on the merits of the challengers' claims, many other tools for stemming the virus and reducing procurement costs remain at the federal government's disposal."

Whether the federal government would seek to enforce the other requirements of the Safer Federal Workforce Task Force has been a lingering question since the district court clarified that its nationwide injunction only applied to the vaccine mandate. As the government determines its next move, one option is to focus on enforcement of the nonvaccine provisions of the task force guidance.

Having upheld the substance of the preliminary injunction, the court then dramatically limited its scope by stating, the "district court enjoined the enforcement of the contractor vaccine mandate — against any contractor, anywhere in the United States, plaintiff in this case or not. We are both weary and wary of this drastic form of relief." [6] The court explained its wariness and weariness as follows: By cutting off parallel lawsuits, nationwide injunctions frustrate foundational principles of the federal court system. They encourage gamesmanship, motivating plaintiffs to seek out the friendliest forum and rush to litigate important legal questions in a preliminary posture. They disturb comity by hindering other courts from evaluating legal issues for themselves. [7]

Based on this reasoning and citing the "proper functioning of our federal court system," the Eleventh Circuit held that "the preliminary injunction in this case must be limited to protecting the parties in this case." [8]

Specifically, the court concluded that any plaintiff state or member of the plaintiff trade group Associated Builders and Contractors Inc. "need not comply with the vaccination requirement in their capacity as contractors, and they are not responsible for including that requirement in lower-tier subcontracts." [9]

What is the status of the contractor vaccine mandate following this decision?

While in line with other courts evaluating the scope of preliminary injunctions against the vaccine mandate, the elimination of the nationwide injunction creates practical challenges for many government contractors across the U.S. Importantly, the latest decision reignites questions about where

and to whom injunctions against enforcement of vaccine mandates apply.

What should government contractors be doing now?

Government contractors are once again faced with complicated questions of whether — or to what extent — they are subject to the contractor vaccine mandate. Contractors should keep a close eye on whether the government takes any action to provide clarity on how the government will enforce the clause — including through revised Office of Management and Budget guidance on application of the mandate pending continued litigation or through revised Safer Federal Workforce Task Force.

The OMB guidance on enforcement says the government will not enforce the mandate, absent further written notice from the contracting agency, where the place of performance identified in the contract is a geographic location subject to an order prohibiting enforcement. That guidance currently identifies all 50 states as subject to an injunction. Does "further written notice" before enforcement mean a contractual communication or just updating the website discussion?

Of course, the next procedural move shifts to the government — whether to appeal the Eleventh Circuit's decision to a Supreme Court that already applied a similar rationale in a Jan. 14 ruling that struck down the Occupational Safety and Health Administration's mandate or voluntarily suspend enforcement of the mandate in a broader fashion.

In the meantime, contractors should:

- Evaluate whether they are members of any plaintiff group covered by a preliminary injunction or perform contracts within states covered by another preliminary injunction.
 - The Eleventh Circuit opinion criticized application of preliminary injunctions based on — even more limited — geographic areas, stating, "injunctive relief operates on specific parties, not geographic territories." Thus, the geographic injunctions issued by other district courts could be subject to revision if other appellate courts follow the Eleventh Circuit's lead.
- Evaluate whether they have already executed contracts with Federal Acquisition Regulation 52.223-99 on ensuring adequate COVID-19 safety protocols for federal contractors, the clause requiring compliance with the Safer Federal Workforce Task Force guidance.
- Alert contracting personnel to be on the lookout for new solicitations and contracts containing the clause.
- Reinvigorate working groups on these issues to ensure that they are able to monitor developments regarding the mandate and comply with any contractual obligations.

Conclusion

For many government contractors, the Eleventh Circuit's decision to vacate the nationwide injunction injects them back into complicated legal, management and labor issues related to the COVID-19 vaccine and related requirements.

Contractors must evaluate whether they are within the scope of a half dozen more limited preliminary

injunctions, whether they have existing agreements containing the relevant clause or it is included in solicitations for which they are competing. Companies need to refocus on these challenging questions amid other significant labor and inflation related challenges.

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[1] Opinion at 10.

[2] Id.

[3] Id. at 789; AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir. 1979) (en banc).

[4] Opinion at 25.

[5] Opinion at 30.

[6] Opinion at 34.

[7] Opinion at 39.

[8] Opinion at 46.

[9] Id. at 44.