

Client Alert: Court Enjoins Enforcement of Federal Contractor Vaccine Mandate in Kentucky, Ohio, and Tennessee

Publications

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On November 30, 2021, the United States District Court for the Eastern District of Kentucky issued an order (PI Order) enjoining the federal government from enforcing the federal contractor vaccine mandate “in all covered contracts in Kentucky, Ohio, and Tennessee.” As contractors develop their compliance plans for this mandate, this significant development may indicate how similar challenges pending in other federal district courts will fare. (See our prior alerts on Executive Order 14042 (EO) and the Task Force Guidance [here](#), [here](#), and [here](#).)

Background

On November 4, 2021, the states of Kentucky, Ohio, and Tennessee filed a federal complaint seeking a preliminary injunction to prevent the federal government from enforcing the vaccine mandate. The states alleged that the vaccine mandate was unlawful under the Administrative Procedure Act and unconstitutional.

The PI Order

On November 30, 2021, the district court granted the preliminary injunction and ordered that “[t]he Government is enjoined from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee.” PI Order at 29. The court noted that, although vaccines are effective and the government may, at times, mandate vaccinations for the public interest, the President likely may not use “congressionally delegated authority to manage the federal procurement of goods and services to impose vaccines on the employees of federal contractors and subcontractors.” *Id.* at 1. In reaching its decision, the court found that the vaccine mandate likely exceeds the President’s delegated authority for federal procurement, including because it: (1) effectively amounts to a sweeping public health regulation, which is beyond the scope of authority delegated to the President under the Federal Property and Administrative Services Act (FPAS); (2) violates the Competition in Contracting Act (CICA); and (3) violates the 10th Amendment by regulating noneconomic activity (*i.e.*, choice to remain unvaccinated) that falls within the States’ police power. *Id.* at 14–20.

The court’s FPAS and CICA analyses are particularly significant for government contract regulation more broadly, and the court’s logic could be extended far beyond the vaccine mandate. For example,

in determining that the vaccine mandate likely violates CICA, the court looked to the recent United States Court of Appeals for the Federal Circuit’s decision in *Nat’l Gov’t Servs, Inc. v. United States*, 923 F.3d 977, 985 (Fed. Cir. 2019), and concluded that “Defendants may run into the same problem [as occurred in *NGS*]: contractors who ‘represent[] the best value to the government’ but choose not to follow the vaccine mandate would be precluded from effectively competing for government contracts.” *Id.* at 15 (quoting 923 F.3d at 990).

The Court considered whether it should issue a nationwide injunction, but chose not to, in deference to the authority of other federal district courts and to prevent forum shopping. *Id.* at 27–28.

What Now?

There are preliminary injunction hearings scheduled in several other challenges to the contractor vaccine mandate over the next week, including before the Southern District of Georgia (December 3) and the Middle District of Florida (December 7). While this PI Order does not apply nationwide, it provides one roadmap for courts in other districts to consider in evaluating similar lawsuits. Notably, as the PI Order alluded to, at least one federal court has dismissed a challenge to the vaccine mandate by individuals for lack of standing. *Hollis v. Biden*, 2021 WL 5500500 (N.D. Miss. Nov. 23, 2021).

With the rapidly approaching January 18 deadline, contractors will be watching closely as each decision adds to the complexity of vaccine mandate compliance plans and policies. Jenner & Block continues to follow closely these developments and to assist our clients in applying the requirements to their unique situations.

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