

CLIENT ALERT: Federal Judge Blocks Contractor Vax Mandate in KY, TN, OH. What States Could Be Next?

On November 30, 2021, Judge Gregory F. Van Tatenhove of the U.S. District Court for the Eastern District of Kentucky [issued a preliminary injunction](#) in Commonwealth of Kentucky et al. v. Biden et al. (Case No. 21-cv-00055) that prohibits the federal government “from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee.” This Client Alert provides a high-level overview of the decision and highlights similar challenges now pending in various U.S. District Courts throughout the country.

In Commonwealth of Kentucky et al., the Court framed the question narrowly:

This is not a case about whether vaccines are effective. They are. Nor is this a case about whether the government, at some level, and in some circumstances, can require citizens to obtain vaccines. It can. The question presented here is narrow. Can the president use congressionally delegated authority to manage the federal procurement of goods and services to impose vaccines on the employees of federal contractors and subcontractors? In all likelihood, the answer to that question is no.

In its 29-page opinion, the Court first navigated the issue of standing and concluded that plaintiffs successfully demonstrated that they suffered an injury in fact, that the injury was fairly traceable to the actions of the defendant, and that a favorable decision would redress the injury, thereby establishing standing and vesting the Court with the power to hear the case.

The Court next turned to the preliminary injunction and said that case essentially boiled down to two buckets of issues: (1) whether the president exceeded his statutory and constitutional authority in promulgating the executive order at issue in this case; and (2) whether the agencies at issue in this case followed the proper administrative procedures. Simply put, the Court rule in favor of the plaintiffs as to the former and in favor of the defendants as to the latter.

Notably, under the first issue, the Court found that the plaintiffs will likely succeed on the merits because President Biden exceeded his delegated authority under the Federal Property and Administrative Services Act (“FPASA”) in promulgating his September 9, 2021 Executive Order ([EO 14042](#)). In turn, the Court also determined that there are “several concerning statutory and constitutional implications from President Biden exceeding his authority under the FPASA,” including issues under the Competition in Contracting Act (“CICA”), the nondelegation doctrine and federalism, and the Tenth Amendment to the United States Constitution.

At bottom, while this opinion is likely welcome news, the decision to enjoin the government from enforcing the contractor vaccine mandate was narrowly limited to contractors and subcontractors with “covered contracts” in Kentucky, Tennessee, and Ohio because the Court declined to issue a “universal” or “nationwide injunction.” Even though the Court’s injunction was limited, other contractors might see similar relief in the near future, as there are several other lawsuits that are currently working their way through the courts.

The following list shows state lawsuits – with pending motions for preliminary injunction – that have been filed in various U.S. District Courts across the country:

- Southern District of Georgia (21-cv-00163) – Alabama, Georgia, Idaho, Kansas, South Carolina, Utah, and West Virginia
- Middle District of Florida (21-cv-02524) – Florida
- District of Arizona (21-cv-01568) – Arizona
- Eastern District of Missouri (21-cv-01300) – Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, Wyoming
- Southern District of Texas (21-cv-00309) – Texas

Takeaway

For now, the contractor vaccine mandate is still applicable for “covered contracts” outside of Kentucky, Tennessee, and Ohio, as the Court’s preliminary injunction (as opposed to a permanent injunction) was narrow in scope. Therefore, covered contractors with covered contracts that are not covered by the decision should be sure to consult the [Safer Federal Workforce Task Force Guidance](#) (and our previous [Client Alert](#)) for more details regarding compliance obligations and how the vaccine mandate – and the workplace safety measures – will impact your workforce and workplace.

Lastly, only time will tell whether other U.S. District Courts will follow Judge Van Tatenhove’s lead and issue a preliminary injunction to enjoin the government from enforcing the contractor vaccine mandate. Of course, given that “universal” or “nationwide injunctions” have become increasingly more frequent (as noted in the opinion), it remains to be seen whether a different court will depart from the limited preliminary injunction issued by Judge Van Tatenhove and instead issue a nationwide injunction to halt to the contractor vaccine mandate across the country.

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For an analysis of how the Executive Order and Deviations apply to your contracts, employees, and workplaces, please reach out to a member of [Maynard Cooper's Government Solutions Group](#).

[Maynard Cooper’s COVID-19 Coronavirus Task Force](#) is closely monitoring all updates to pending legislation related to the COVID-19 pandemic. We are dedicated to providing client-focused services, and it is the goal of the Task Force to continue this level of service to each and every client as they face challenges about planning for and responding to the threats posed by the virus. If you have any questions, please reach out to your relationship partner or any of the attorneys serving on the Task Force.

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