

## Federal Contractor Vaccine Mandate Blocked in Nationwide Injunction

On December 7, 2021, a federal district court in Georgia issued a nationwide [injunction](#) blocking the federal contractor vaccine mandate and other protocols. In a 28-page decision, the district court determined that the underlying executive order and guidance issued by the White House exceeded the government's legal authority and posed constitutional issues. The decision represents a setback in the government's three-month-old initiative and follows a defeat before another district court on its broader attempts to impose vaccine and testing obligations under the Occupational Safety and Health Administration Emergency Temporary Standard (ETS).

Federal contractors, however, should recognize that this is a preliminary determination by one district court and further legal developments may occur. Indeed, the government filed a notice of appeal to the U.S. Court of Appeals for the Eleventh Circuit and requested a stay of the district court order on December 9, 2021. As such, a full-scale pullback of policies and protocols may not be warranted in the immediate aftermath of this order.

We have previously detailed the requirements of the federal contractor mandate and explained its novel, as well as aggressive, coverage positions taken by federal authorities. The compliance obligations triggered five lawsuits brought by at least 22 states across the country. On November 30, a Kentucky district court enjoined enforcement of the mandate in Tennessee, Texas, and Ohio. In response, the National Aeronautics and Space Administration (NASA) issued a statement that it would not seek enforcement of the contract clause imposing the mandate in the three states. (Notably, that was not a definitive statement that the government would forego, in total, including the clause in all new or existing contracts in those states.)

December 7 marked the Georgia federal district court's turn to weigh in on the [federal contractor mandate](#) and the court issued a broad rejection of the government's authority to issue and enforce Executive Order 14042. The decision begins with a recognition of the politically charged nature of vaccines in general by accepting the idea that vaccines are "effective" and noting the pandemic's toll. The district court then moves to the request that the Associated Builders and Contractors (ABC) intervene in the matter on behalf of its members. Finding intervention appropriate, the court next disposed of the government's standing arguments and then took on the merits of the government's authority.

The district court considered the government's broad ability to impose obligations on federal contractors under the Federal Property and Administrative Services Act (Procurement Act). However, the court determined that the government's ability is not without limit and determined that the health-related protocols were not reasonable related to the efficiency and economy of government contracting. Turning to whether the mandate would result in irreparable injury—another key inquiry in considering an injunction—the district court found that the effort and time spent to comply with the mandate and the anticipated burdens would result in broad injury to federal contractors.

Finally, the district court weighed whether a nationwide injunction would be appropriate. While the court considered taking its cue from the Kentucky district court and issuing a limited injunction, arguments from ABC about the breadth of the effects of the mandate on their membership nationwide convinced the judge that the mandate should be nationwide.

Predicting the next steps in the litigation is difficult based on the unique landscape the government faces. In other instances where the government's mandates have suffered defeats before district courts, the subsequent events have not resulted in quick reversals. Myriad reasons exist. As the U.S. Court of Appeals for the Sixth Circuit's measured approach to the OSHA ETS litigation has shown, appellate courts are slow to take up and reverse district court orders on broad government mandates. Notably, the Obama-era Fair Labor Standards Act (FLSA) update to the salary basis test remained mired in appellate litigation for years after a Texas district court issued a nationwide injunction. Moreover, the White House's view at this point may be that it has already won by having the mandate in place for nearly three months, which resulted in contractors scrambling to get employees vaccinated in advance of the initial December 8, 2021, deadline.

The pandemic, as well as the rise of the omicron variant, has significantly changed the legal and political landscape. Indeed, the notice of appeal signals that the federal government is seeking to continue its aggressive approach to vaccinating workers and impose a mandate covering more than 25% of the workforce is clearly a high priority.

### **Takeaways for Federal Contractors**

- Federal contractors should feel some measure of relief from the compliance obligations of the federal mandate, which took very broad (and unprecedented) coverage positions.

The federal government, through the General Services Administration (GSA), has issued a [statement](#) that (1) it will "not enforce" the vaccine provisions in the guidance, (2) contractor employees do not have to be vaccinated, and (3) contractors will be eligible for new contracts without agreeing to the mandate. While the statement provides some level of relief, it does not definitively withdraw the clause from existing contracts where contractors have already agreed to the clause. Further, as the statement, does not address the masking and social distancing protocols, it remains unclear whether those obligations continue to exist.

- Nonetheless, contractors, in the near term, should remain in a holding pattern on compliance while these open questions persist. At this point, contractors should pause drastic compliance steps that were driven by the mandate such as terminating unvaccinated workers or placing them on unpaid leave. However, prudence dictates that a company should continue to confirm vaccination status for workers and should continue to process accommodation requests.
- Further, lifting the masking and social distance protocols in the guidance, which technically went into effect in late September, is not advisable as the government's statement so far has not addressed the issue.
- We also note that prudent contractors should keep track of any attempts by contracting officers to add any COVID-19 protocol-related clauses into contracts. Until this decision, contractors had weak grounds to fend off these requests by federal contracting authorities. However, the district court's decision gives contractors strong grounds to resist these requests.

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