

Injunctions May Only Pause Gov't Contractor Vaccine Mandate

By **Richard Arnholt**

The U.S. District Court for the Eastern District of Kentucky's Nov. 30 injunction, in *Kentucky v. Biden*, prohibiting enforcement of the government contractor vaccine mandate against contractors and subcontractors in Kentucky, Ohio and Tennessee, had national impact.

At the time, we thought a nationwide injunction seemed to make sense.[1] On Dec. 7, the U.S. District Court for the Middle District of Georgia, which had held a hearing on a motion for a preliminary injunction on Dec. 3 in *Georgia v. Biden*, issued such an injunction.



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Just over a week later, on Dec. 16, the U.S. District Court for the Western District of Louisiana issued a third preliminary injunction in *Louisiana v. Biden*, prohibiting enforcement of the mandate, but limited the scope of the injunction to the plaintiff states.

As discussed below, the Louisiana decision differed significantly from the reasoning of the Georgia and Kentucky district court decisions, a split that will likely encourage the U.S. Department of Justice to continue litigating to defend the government contractor vaccine mandate, and further increase the likelihood that this issue will ultimately be resolved by the U.S. Supreme Court.

The Georgia Decision

Exceeded Statutory Authority

The Georgia order[2] granted the motion for a preliminary injunction filed by the plaintiffs — Georgia, Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia — finding that they "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 (FPASA) when issuing Executive Order [EO] 14042." [3]

The order also granted in part a motion to intervene by Associated Builders and Contractors Inc. The court granted ABC's motion for a preliminary injunction but held that ABC's Georgia chapter, which had also sought to intervene, had not presented evidence that any specific member of that chapter would have standing.

After resolving the question of standing in the plaintiffs' and the intervenor's favor, the court stated that, although FPASA grants the president some authority to set governmentwide procurement policy on matters common to all agencies, it was "unconvinced, at this stage of the litigation, that it authorized him to direct the type of actions by agencies that are contained in EO 14042."

The court found that, because the government contractor vaccine mandate operates as a regulation of public health, and will have a major impact on the economy at large as it "limits contractors' and members of the workforce's ability to perform work on federal contracts," it was a matter of "vast economic and political significance" that required explicit authorization from Congress.

Because the court could not find any indication that "Congress clearly gave the President authority to require all individuals who work on or in connection with a federal contract (valued over \$250,000) to be fully vaccinated against COVID-19," it found the mandate to be unauthorized.

The court also held that even if the vaccine mandate was not a matter of vast economic and political significance such that clear authorization from Congress was required, the plaintiffs were likely to succeed on the argument that the executive order did not have a sufficient nexus to FPASA to authorize the president's actions.

In reference to an argument raised by the plaintiffs during the Dec. 3 hearing, the court also stated that were it to accept the DOJ's argument that FPASA authorized the issuance of a vaccine mandate, FPASA "would be construed to give the President the right to impose virtually any kind of requirement on businesses that wish to contract with the Government ... so long as it could lead to a healthier and thus more efficient workforce or it could reduce absenteeism."

Having held that the plaintiffs were likely to succeed on the merits of the FPASA argument, the court declined to address the procedural argument that the government had failed to comply with the Administrative Procedure Act.

It also declined to address the argument that FPASA and the executive order were unconstitutional under the nondelegation doctrine and because they exceeded Congress' authority by intruding on state sovereignty protected by the 10th Amendment.

However, the court referenced the U.S. Court of Appeals for the Fifth Circuit's November decision in *BST Holdings LLC v. U.S. Department of Labor, Occupational Safety and Health Administration*, enjoining the OSHA vaccine mandate.[4]

The court also referenced the Eastern District of Kentucky decision in *Kentucky v. Biden*, enjoining the government contractor vaccine mandate in Kentucky, Ohio and Tennessee.

These decisions addressed both the procedural argument related to Administrative Procedure Act compliance, and the argument related to constitutionality under the nondelegation doctrine and the 10th Amendment.[5]

Risk of Irreparable Injury and the Balance of Harms

Regarding irreparable injury, the court was not convinced by the DOJ's argument that losing government contracts would not cause irreparable harm because contractors could challenge the contract provision and recover contract losses through administrative processes.

Instead, the court cited the testimony from three witnesses, each of whom described high irrecoverable compliance costs, and to declarations by representatives of ABC that identified similar compliance costs.

The court also held that the balance of the harms favored issuing an injunction because the injunction would do no more than maintain the status quo, insofar as entities could still encourage their employees to get vaccinated and employees could freely choose to be vaccinated.

If no injunction was issued, the court said, the plaintiffs would be forced to comply with the

mandate, requiring them to make decisions that would significantly alter their ability to perform federal contract work, which is critical to their operations. The court also stated that it appeared that not granting an injunction "could imperil the financial viability of many of ABC's members."

The Nationwide Injunction

Primarily because the intervenor, ABC, is a trade association with members nationwide, the court determined that the injunction it issued had to be nationwide. For that reason, the court ordered as follows:

[T]he Court ORDERS that Defendants are ENJOINED, during the pendency of this action or until further order of this Court, from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in any state or territory of the United States of America.

While the injunction prohibits enforcement of the government contractor vaccine mandate, the order does not answer a question raised by the DOJ during the Dec. 3 hearing, and again in the emergency motion to stay the injunction filed by the DOJ in the case before the Eastern District of Kentucky — whether the government can continue including the government contractor vaccine mandate contract provision in government contracts.

Arguably, the inclusion of the contract provision in agreements is itself enforcement of Executive Order No. 14042, meaning that until the courts provide clarification, contractors could reasonably take the position that inclusion of any implementing contract clause, including Federal Acquisition Regulation 52.223-99 or Defense Federal Acquisition Regulation Supplement 252.223-7999, violates the injunction.

On Dec. 17, the U.S. Court of Appeals for the Eleventh Circuit denied the government's motion to stay the enforcement of the nationwide preliminary injunction.[6]

The Louisiana Decision

On Dec. 16, in the challenge to the federal contractor vaccine mandate filed by Louisiana, Mississippi and Indiana, the Western District of Louisiana granted the plaintiff's motion for a preliminary injunction with respect to "contracts, grants, or any other like agreement by any other name between the Plaintiff States and the national government." [7]

However, the ruling denied the motion for a preliminary injunction to the extent it sought to enjoin the application of Executive Order No. 14042 against contracts between private contractors and the government.

Interestingly, unlike the Eastern District of Kentucky and Southern District of Georgia, the Louisiana court concluded:

[A] reasonably sufficient nexus can exist between EO 14042 and the government's policy under [the Federal Property and Administrative Services Act] to procure and manage properties and services in an economical and efficient manner.

Instead, the court concluded that the executive order is unlawful because it conflicts with the 10th Amendment.

The Louisiana court also split with Kentucky on another point, holding that the Sept. 30 FAR deviation memo constituted a final agency action "ripe for review and subject to the rule making procedural requirements of [Title 41 of the U.S. Code, Section 1707]."[8]

The court did not agree with the DOJ's argument that the urgent and compelling circumstances exception to that statute's notice and comment requirement applied, stating, "we doubt the pandemic makes compliance with a relatively short comment period impracticable two years into the pandemic."

Also, the court interpreted the FAR deviation memo's encouragement that agencies apply the contract provision broadly, coupled with the fact that there is no express exclusion for grants in the FAR memo, as encouraging the application of the clause to grants. The opinion states that the National Institutes of Health would appear to agree, but we are not aware of any other court that has previously concluded that the FAR Council intended for the deviation contract clause to apply to grants.

It seems that based on this conclusion, the court found that the FAR memo is an improper deviation from the express limitation with regard to grants in Executive Order No. 14042.

What Do Government Contractors Do Now?

As of Dec. 17, three injunctions of the federal contractor vaccine mandate remain in place pending appeal:

- All contractors and subcontractors in Kentucky, Ohio and Tennessee by the Eastern District of Kentucky;
- All contractors and subcontractors nationwide by the Southern District of Georgia; and
- Only the states of Louisiana, Mississippi and Indiana by the Western District of Louisiana.

Decisions are still pending on preliminary injunction motions in the three other state challenges to the government contractor vaccine mandate. The statuses of those cases are as follows:

- U.S. District Court for the Southern District of Texas — On Dec. 10, the court stayed Texas v. Biden without explanation.

- U.S. District Court for the Middle District of Florida — On Dec. 9, the court issued an order permitting supplemental briefing in Florida v. Biden. On Dec, 14, the DOJ filed a motion to stay or, in the alternative, extend the responsive deadline. Florida filed its response to that motion on Dec. 16.
- U.S. District Court for the Eastern District of Missouri — In Missouri v. Biden, briefing continues on the plaintiffs' motion for a preliminary injunction filed Nov. 12.

For the time being, the government recognizes that the government contractor vaccine mandate is unenforceable. Shortly after the nationwide injunction was issued, the Office of Management and Budget released guidance instructing agencies to tell contractors that vaccine mandate in existing contracts will not be enforced in the area covered by the injunctions — the U.S. and its outlying areas, that the clause is not to be included in new contracts, and that the clause should be removed from pending solicitations.[9]

Therefore, contractors and subcontractors have the discretion to stop efforts to meet the Jan. 18, 2022, deadline for employees to be fully vaccinated, among other compliance measures. Contractors also now have a basis for rejecting the inclusion of the vaccine mandate contract provision in contracts, contract-like agreements and subcontracts.

That said, if contractors want to proceed with mandatory vaccination policies, they are welcome to do so to the extent those actions comply with state law.

But now that the government contractor vaccine mandate has been enjoined, there is no longer an argument that the federal requirement supersedes any conflicting state law requirements according to the U.S. Constitution's supremacy clause. For that reason, it is important for contractors that are moving forward with vaccine mandates to carefully review any applicable state law restrictions in states such as Texas, Florida and Tennessee.

Finally, remember that this is not the last word on the government contractor vaccine mandate. There are still pending appeals of district court injunctions. Also, additional decisions are expected in the next few days from district courts in Florida, Missouri and Texas that are also considering challenges to the government contractor vaccine mandate.

Even if all of these courts find Executive Order 14042 unlawful, the DOJ will likely continue to litigate.

Indeed, on Dec. 6, the Eleventh Circuit issued a decision in Florida v. U.S. Department of Health and Human Services rejecting Florida's request to preliminarily enjoin enforcement of the Centers for Medicare and Medicaid Services vaccine mandate,[10] which has already been enjoined in some states by the U.S. District Court for the Eastern District of Missouri in Missouri v. Biden,[11] and, in November, nationwide by the U.S. District Court for the Western District of Louisiana in Louisiana v. Xavier Becerra.[12]

After a string of legal defeats over the past few weeks, the Eleventh Circuit decision will no doubt encourage the DOJ to press the argument that the vaccine mandates are lawful. Because the DOJ may ultimately prevail with regard to the government contractor vaccine mandate, while contractors can for now cease efforts toward full compliance, it would be prudent to keep the compliance infrastructure in place for the time being.

Richard Arnholt is a member at Bass Berry & Sims PLC, and a frequent contributor to the firm's GovCon & Trade blog.

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[1] <https://www.bassberrygovcontrade.com/doj-seeks-stay-of-ky-oh-and-tn-injunction-hearings-go-forward-in-other-government-contractor-vaccine-mandate-cases/>.

[2] <https://www.bassberrygovcontrade.com/wp-content/uploads/sites/90/2021/12/S.D.-Ga.-Order-on-PI.pdf>.

[3] <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>.

[4] <https://www.ca5.uscourts.gov/opinions/pub/21/21-60845-CV0.pdf>.

[5] <https://www.bassberrygovcontrade.com/wp-content/uploads/sites/90/2021/11/EDKY-Order-Granting-PI.pdf>.

[6] https://www.bassberry.com/wp-content/uploads/21-14269_DocketEntry_12-17-2021.pdf.

[7] <https://www.bassberrygovcontrade.com/wp-content/uploads/sites/90/2021/12/12-16-2021-WD-of-LA-Ruling-and-Order.pdf>.

[8] <https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf>.

[9] https://cdn.govexec.com/media/gbc/docs/pdfs_edit/120921cb1.pdf.

[10] <https://www.bassberrygovcontrade.com/wp-content/uploads/sites/90/2021/12/11th-Cir-Fla-v.-HHS.pdf>.

[11] <https://www.bassberrygovcontrade.com/wp-content/uploads/sites/90/2021/12/ED-Missouri-CMS-injunction.pdf>.

[12] <https://www.bassberrygovcontrade.com/wp-content/uploads/sites/90/2021/12/WD-Louisiana-CMS-nationwide-injunction.pdf>.