

Federal Contractors in Limbo After Vaccine Mandate Nationwide Injunction Is Narrowed

A U.S. Court of Appeals for the Eleventh Circuit panel breathed new life into the federal contractor vaccine mandate. While the panel determined that the COVID-19 vaccine mandate exceeded the president's legal authority, it also determined that the nationwide injunction was too broad. This technically allows the contractor mandate to go forward in certain circumstances—e.g., in contracts with entities that were not plaintiffs to the Eleventh Circuit litigation or in the selection process following solicitations in which no plaintiff to the Eleventh Circuit case participated as a bidder. As such, the injunction applies in certain circumstances in Georgia, Utah, Alabama, Idaho, Kansas, West Virginia, and South Carolina, and to members of the Associated Builders and Contractors (ABC). But, as a reminder, other injunctions still enjoin the contractor mandate in other circumstances and states. As the last action from the government was to stand down in the face of the nationwide injunction, contractors should take a cautious approach until hearing whether the Biden administration will seek to reimpose the obligations.

The central question on the merits was whether the Procurement Act authorizes the president to require contractor employees to be vaccinated. After a broad discussion of the legislative history and previous court opinions regarding the Procurement Act, the panel determined that the act granted broad authority related to the procurement of goods and services but did not allow for the exercise of executive authority beyond the specific provisions in the statute. Finding that the Procurement Act was silent as to matters related to the health of contractor employees, the panel determined that "an all-encompassing vaccine requirement" was beyond the four corners of the Procurement Act as enacted by Congress. According to the panel, where expansions of authority for federal contractor obligations have been made, Congress has made those changes, including increases to workplace protections in the Service Contract Act (SCA) or enhancing cybersecurity qualifications for contractors under the Strengthening and Enhancing Cybersecurity by Using Research, Education, Information, and Technology (SECURE) Act. Turning to the government's argument that the vaccine mandate would increase efficient contracting, the panel recognized that vaccine-related benefits such as reduced absenteeism could make procurement more efficient. However, the panel held that efficiency was merely a broad goal in the preamble of the Procurement Act and the absence of the term in the statutory language was insufficient to support executive action. The panel also held that an injunction was appropriate as contractors would suffer irreparable harm because of the significant resource expenditures required to comply with the mandate.

Notwithstanding its determination that the plaintiffs were likely to succeed on the merits, the panel held that the nationwide injunction was inappropriate. The panel recognized that nationwide injunctions should be limited to "appropriate circumstances." The panel then delved into a broad discussion of nationwide injunctions and took a dim view of the recent trend favoring such injunctions. Narrowing the broad district court injunction, the Eleventh Circuit fashioned the injunction to apply to "any plaintiff State or member of the Associated Builders and Contractors" and to the selection process when any such plaintiff participates as a bidder.

The Eleventh Circuit opinion, to be clear, does not alter other district court injunctions enjoining the vaccine mandate. These injunctions have been issued in various states, including by federal courts in Arizona and Kentucky.

Takeaways

Outside of the plaintiffs in the Eleventh Circuit case, the decision clears the way to possibly revive the contractor mandate. Whether the Biden administration will move to enforce the mandate remains unclear. The last official statement as far as the government's intention was standing down in light of the district court's nationwide injunction. (As of the date of this Update, the [COVID-19 resource page](#) for federal contractors continues to reference the nationwide injunction and includes detailed [FAQs](#) related to implementing the injunction.) As such, it is logical that the government will issue another statement if it intends to move forward with the mandate where it can. The narrowing of the nationwide injunction, however, greatly complicates the administration taking drastic action as challengers of the mandate in the other federal jurisdictions will move quickly to obtain injunctions covering their jurisdictions.

After making these near-term decisions, the administration may consider other roads. It could seek a favorable decision on the merits by petitioning the Eleventh Circuit for *en banc* consideration or seek review in the U.S. Supreme Court. Moreover, the administration may consider sidestepping the legal battle and rely on its anticipated rulemaking related to issuing a permanent Occupational Safety and Health Administration (OSHA) COVID-19 standard to address the pandemic.

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