

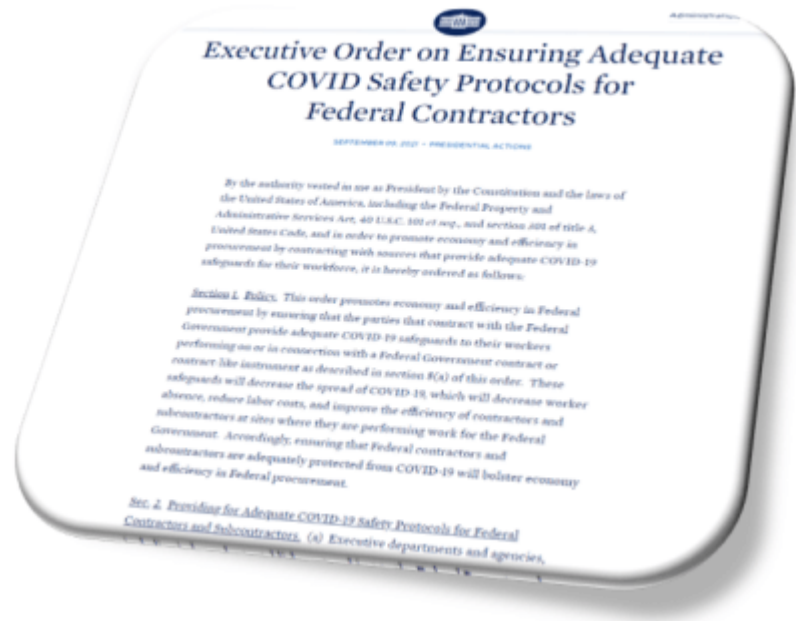
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The Latest with Pres. Biden's Federal Contractor COVID-19 Vaccine-Mandate Executive Order

By Conn Maciel Carey LLP's [COVID-19 Task Force](#)

It has been a real adventure trying to track all the different legal challenges in so many different courts to President Biden's various different executive actions related to vaccination. While the fate of the OSHA Vaccinate-or-Test ETS (dead) and the CMC Healthcare Vaccine-Mandate (very much alive) are essentially settled by the Supreme Court, the Federal Contractor Vaccine-Mandate Executive Order (EO 14042) is still meandering its way through the federal courts. And there was a lot of activity in the courts this past Friday, January 21st, regarding the federal contractor EO and the federal employee vaccination mandate.

In the first case, *Feds for Medical Freedom v. Biden*, employees of federal contractors and employees of the federal government together are challenging both Executive Orders 14042 (vaccine-mandate for federal contractors) and 14043 (vaccine-mandate for federal employees). Judge Jeffrey V. Brown (a Trump-appointee to the S.D. of Texas) issued an opinion and order enjoining only enforcement of the federal employee mandate. Judge Brown's reasoning in that case boiled down to a conclusion that injunctive relief is appropriate because: (1) the "Hobson's Choice" of a workplace vaccine-mandate creates irreparable harm; and (2) the challenging federal employees have a



likelihood of success on the merits because the President acted *ultra vires* and the implementation of EO 14043 violates the Administrative Procedures Act. Notably, Judge Brown declined to take action with regard to the federal contractor EO, noting that Judge R. Stan Baker (a Trump appointee to the S.D. of Georgia) in *Georgia v. Biden* had previously enjoined the federal government from enforcing the vaccination mandate on a nationwide

basis.

While Judge Brown's decision in *Feds for Medical Freedom v. Biden* did not change the status of the federal contractor EO, on the same day, Judge Baker issued a new order with regard to the injunction he had put in place in *Georgia v. Biden* in December. First, Judge Baker declined to address whether private federal contractors are enjoined from mutually agreeing with a federal agency to include COVID-19 safety clauses in their contracts; i.e., to voluntarily comply with the Safer Federal Workforce Task Force ("Task Force") guidelines, as he viewed that as improperly seeking an advisory opinion while the case is pending on appeal. But on the broader question as to the scope of his national injunction, on Friday he wrote:

The answer to the inquiry is evident from the language the Court used—as well as the language the Court noticeably did not use—in issuing the injunction [in December]. The Court stated, “Defendants are ENJOINED ... from enforcing the vaccine mandate....” Accordingly, no clarification is necessary. Indeed, Plaintiffs’ Amended Complaint asks, in its Prayer for Relief, for the Court to “[e]nter a declaratory judgment that Defendants ... have acted to impose a broad-sweeping, unlawful, and unconstitutional COVID-19 vaccine-mandate, and that such COVID-19 vaccine-mandate is unlawful and unenforceable,” and for the Court to “[g]rant a preliminary and permanent injunction prohibiting Defendants and those acting in concert with them from enforcing this broad sweeping, unlawful, and unconstitutional mandate.” While there was evidence before the Court indicating that other COVID-19 safety-related requirements were also established as a result of the Executive Order (i.e., masking and physical distancing requirements), the evidence and arguments presented to the Court in the parties’ briefs and at the hearing on the Motion for Preliminary Injunction focused almost exclusively on the vaccination requirement, and the Court’s Order on the Motion for Preliminary Injunction did not reference, discuss, or analyze any of the other COVID-19 safety-related requirements.

This ruling is consistent with preliminary injunctions issued in two other federal district courts that focused only on the vaccination requirements in the federal contractor EO:

- *Missouri v Biden* (E.D. Missouri) Order of U.S. Magistrate Judge David D. Noce on 12/20/21 (“Defendants are enjoined from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in MO, NE, AK, AR, IO, MN, NH, ND, SD, and WY.”)
- *Kentucky v. Biden* (E.D. Kentucky) Opinion and Order of Judge Van Tatenhove on 11/30/21 (“The Government is ENJOINED from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in KY, OH, and TN.”)

Three federal district courts have focused injunctive relief on enforcement of the vaccination requirements for federal contractors, but did not constrain the federal government from enforcing the other attendant COVID-19 safety requirements for federal contracts that are included with the new clause pursuant to EO 14042. However, U.S. District Court Judge Stephen Merryday issued a much broader preliminary injunction in *Florida v. Nelson* (M.D. Florida) on 12/22/21, “prohibiting enforcement of EO 14042 in any covered contract in Florida.”

While the federal contractor EO is not presently enforceable nationwide, and it seems that each week that vaccine-mandate is dealt another blow, there are a couple of reasons that this recent past may not prologue, and that the federal contractor mandate being killed is far from a given:

- First, each of these recent road bumps for the federal contractor mandate has come at the hands of a US District Court. As we have seen over the last year, the district courts' decisions in the various vaccine-mandate cases (i.e., private employer, OSHA ETS, healthcare, etc.) have been flipped, vacated, and remanded with some regularity as those cases have moved through the federal courts. It will be much more meaningful what happens next in the appellate courts. We expect decisions on the federal contractor vaccine-mandate in the 5th Circuit (*Louisiana v. Biden*), 6th Circuit (*Kentucky v. Biden*), 8th Circuit (*Missouri v. Biden*), and the 11th Circuit (*Florida v. Nelson*) over the next month or so.
- The Courts of Appeals and the Supreme Court have treated the COVID-19 vaccine-mandates differently based upon their views of the different statutes that underpin the executive authority giving rise to the different mandates. For example, as we saw on January 13th, just as the Supreme Court was effectively killing the OSHA vaccinate-or-test ETS, the Court issued another opinion that same day lifting the stay imposed by the lower courts of the CMS vaccine-mandate that Pres. Biden had ordered for healthcare workers at facilities that accept federal dollars in the form of Medicare/Medicaid reimbursement. The Court found that "Congress has authorized the Secretary [of HHS] to impose conditions on the receipt of Medicaid and Medicare funds that "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.'" It will be interesting to see whether the Supreme Court views the federal contractor mandate as more like the OSHA ETS or the CMS rule, but one characteristic that could be impactful to the Court is the part about the application of the mandates only to entities that accept federal dollars. In that regard, the federal contractor rule is more like the CMS rule (which the Supreme Court upheld) than the fed OSHA ETS.

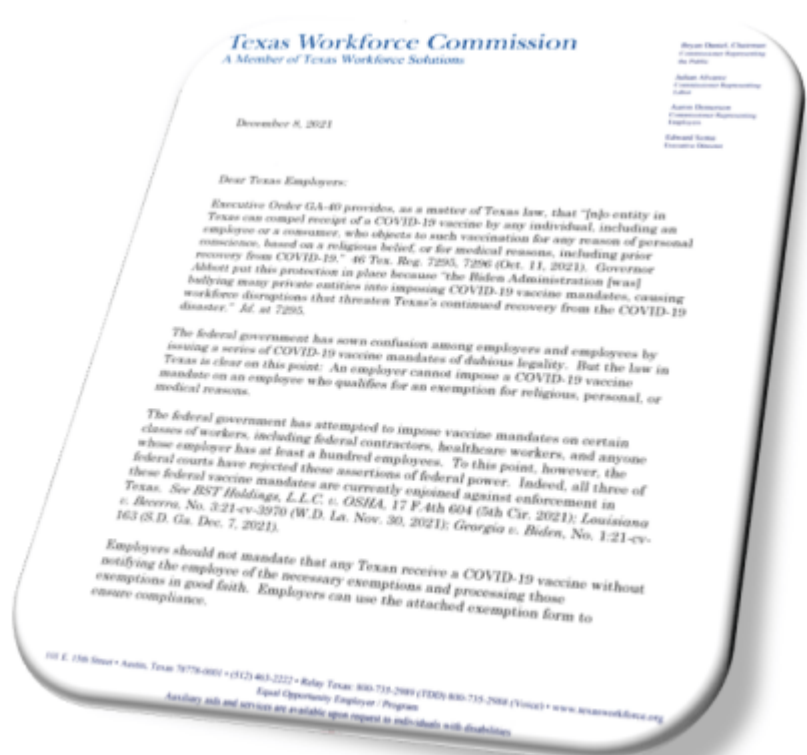
Vaccination requirements for Federal Contractor Employees

These federal court injunctions against enforcement of the federal contractor vaccine-mandate were issued before the deadline set by the Task Force for covered contractor employees to become fully vaccinated. So, as those challenges to the federal contractor EO move through the court system, there is no requirement in place for private federal contractor employers to enforce a mandatory vaccination policy.

But just so you do know the full range of options that federal contractors have, even while the mandate is stayed, the federal court injunctions do not prohibit any private employer, which happens to be a federal contractor, from requiring vaccinations for their own employees and/or their subcontractors as a matter of the company's own policy, even if that vaccination policy was issued in anticipation of coming into compliance with the federal contractor mandate. There have been quite a number of lawsuits around the country brought by employees against their private employers, and federal judges (including the Supreme Court) have consistently declined to grant emergency injunctive relief, and some cases have been dismissed outright on the merits. Indeed, one of the first lawsuit challenging a COVID-19 vaccination requirement was a challenge to a private employer's vaccination policy before President Biden had issued any of his federal vaccine-mandates. In June of 2021, in the case of *Bridges v. Houston Methodist*, US District Court Judge Lynn Hughes (a Reagan-appointee to the S.D. Texas) dismissed the wrongful discharge claims finding no violation of public policy. The closing paragraph of this decision sums up the court's reasoning:

Although her claims fail as a matter of law, it is also necessary to clarify that [the plaintiff] has not been coerced. She says that she is being forced to be injected with a vaccine or be fired. This is not coercion. [The employer] is trying to do their business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients and their families safer. She can freely choose to accept or refuse a COVID-19 vaccination; however if she refuses she will simply need to work somewhere else. If a worker refuses an assignment or other directive, he may be properly fired. Everyone’s employment includes limits of the worker’s behavior in exchange for his remuneration. This is all part of the bargain.

However, after this case was decided, Governor Abbott issued Executive Order [GA-40](#), which requires employers who mandate COVID-19 vaccinations to inform their employees of the available exemptions (“medical reasons including prior recovery from COVID-19” and “reasons of personal conscience including religious beliefs”), and to process exemption requests received in good faith. The Texas Workforce Commission sent a [Letter To Employers](#) on these requirements, and is encouraging employees to report violations of the Governor’s Executive Order. A dozen other states have passed laws intended to frustrate the Biden Administration’s efforts to require COVID-19 vaccinations, featuring one or more impediments, such as prohibiting employers from “requiring” disclosure of vaccination status, providing additional reasons for employees to seek exemptions (e.g. ethical objections, natural immunity), publishing special forms to be used, requiring employers to “liberally” construe such requests, providing for summary review of employer’s decisions by an ALJ, and establishing a hotline for employees to complain about their employer’s implementation of vaccination requirements. While we are unaware of any private companies having been fined or prosecuted for violations of these new state laws, if your organization decides to impose mandatory vaccination requirements for employees, it is necessary to comply with the applicable state requirements, especially while the federal preemption protection of the OSHA vaccinate-or-test ETS and the federal contractor EO have lost their preemptive protection because of the judicial stays.



Other COVID-19 Safety Requirements

After Judge Baker issued the national injunction related to the federal contractor EO in December, this notice was posted on GSA’s COVID-19 website: “GSA and Federal agencies using GSA contracts will take no action to

enforce FAR Clause 52.223-99, Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors, in any GSA contract or contract-like instrument.” Similar notifications were posted on other federal agency procurement websites, and the Task Force guidance webpage for federal contractors indicated that: “The Government will take no action to enforce the clause implementing requirements of Executive Order 14042, absent further written notice from the agency.”

Acknowledging Judge Brown’s decision on Friday, the Task Force website was updated over the weekend with this announcement:

NEW To ensure compliance with an applicable preliminary nationwide injunction, which may be supplemented, modified, or vacated, depending on the course of ongoing litigation, the Federal Government will take no action to implement or enforce the COVID-19 vaccination requirement pursuant to EO 14043 on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees. Safer Federal Workforce Task Force guidance on other Federal agency safety protocols based on vaccination status—including guidance on protocols related to masking, distancing, travel, testing, and quarantine—remains in effect.

We anticipate that new guidance will be posted and/or official written notice will be sent directly to government contractors. Our advice to federal contractors that have already accepted the terms of the new clause implementing EO 14042 in their contracts is to take steps to demonstrate compliance with these COVID-19 safety measures:

1. Determine the current vaccination-status of your own employees working on or in connection with amended and new federal contracts that contain the new clause.
2. On a weekly basis, check the CDC COVID-19 Data Tracker County View website for community transmission information for all covered contractor workplaces to determine proper workplace safety protocols.
3. Designate a COVID-19 coordinator responsible for communicating to your employees and visitors about workplace safety requirements for covered contractor workplaces based upon the level of community transmission with appropriate signage, policies, and procedures.
4. Enforce compliance by employees and visitors with CDC guidance for masking and physical distancing in covered contractor workplaces.
5. Review your testing and quarantine policies in light of the most recent guidance from the CDC and state and local health departments.

And just as a reminder to all federal contractors (whether or not any of their current contracts contain the EO 14042 new clause), as indicated on the Task Force website: Federal agency COVID-19 workplace safety protocols for Federal buildings and Federally controlled facilities still apply in all locations. Contractor employees working onsite in those buildings and facilities must still follow Federal agency workplace safety protocols when working onsite.

That means that employees of federal contractors and subcontractors onsite at federal installations must provide proof of vaccination status or a recent negative COVID-19 test result, and follow the masking and physical distancing and other safety requirements as instructed at each federal workplace.

Let us know if you have any questions or if there is anything we can do to help keep your COVID-19 Prevention and Response policies up to date as the courts continue to monkey around with the federal requirements.