


APRIL 14, 2022 | OSHA RULEMAKINGS & STANDARDS

# 11th Cir. Hears Oral Argument in Challenge to Biden's EO for a Federal Contractor COVID-19 Vaccine-Mandate

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

This past Friday, April 8, 2022, the US Court of Appeals for the Eleventh Circuit heard oral argument in *Georgia v. Biden*, one of the legal challenges to President Biden's Executive Order imposing a hard [vaccine-mandate on federal contractors](#). This was the first of several challenges to the federal contractor vaccination mandate to be heard at the US Court of Appeals level, and this particular challenge reaches the 11<sup>th</sup> Circuit with a rare *nationwide* temporary injunction imposed at the district court level.

There's a link to the recording of the 11<sup>th</sup> Circuit argument on this page – <https://www.ca11.uscourts.gov/oral-argument-recordings>. Scroll down to docket number 21-14269. The recording is difficult to load, it stops and starts, and the sound quality is uneven, so if you don't want to subject yourself to that, here is a summary of the argument and our best effort to read the tea leaves. 

During this hearing, the three-judge panel was most interested in two aspects of the dispute:

1. The extent of the President's powers under the Procurement Act; and
2. Whether the District Court abused its discretion in issuing a nationwide injunction.

On the first point, it sounded as if the judges were hoping for more precedent or better facts than had been supplied in the briefs. The federal government argued that there is a "genuinely close nexus" between the statute and executive order 14042, because vaccinations will reduce the level of absenteeism, sick leave, and delays in federal contracting. Whereas the attorneys for the challenging States and the trade association argued that there is a complete absence of precedent for a sweeping executive order that forces a medical procedure on a substantial portion of the national workforce – a social policy in the guise of contracting terms.

Two judges seemed receptive to the federal government's position that the COVID-19 vaccination mandate for federal contractors is similar to requirements that are more burdensome but which survived previous legal challenges; e.g., anti-discrimination and minimum wage.

Although the 11<sup>th</sup> Circuit had already denied a motion by the federal government in December 2021 to limit the

nationwide-scope of the preliminary injunction, at this hearing, it sounded as if they are now inclined to limit the scope of the injunction, acknowledging that national injunctions are quite rare, and the arguments made by the States and the Association of Builders and Contractors were “rather thin.” Judge Pryor said he could see both sides of the case – telling the Department of Justice attorney: “I don’t think you are wrong, but that I am not sure you are right.” Though he also said it would “troubling” to maintain the nationwide mandate, giving relief to those who did not ask for it, who may prefer to require their employees to be vaccinated for COVID-19.

Overall, it is our impression that it is likely that the national injunction will be scaled back to apply only to the parties before the court – the named States and members of a trade association.

There are five other cases pending in different federal courts where more limited injunctions are in force. If the national injunction is lifted in this Georgia case, the federal government may well decide to maintain the *status quo* – that is, no enforcement actions will be taken while the fate of EO 14042 remains uncertain – but the federal government could take a patchwork approach, as it did with regard to the vaccination mandate under the CMS Rule as it moved through the lower courts on its way to the Supreme Court.

We will keep a close out for the decision from the 11<sup>th</sup> Circuit and will share an update when we see it. In the meantime, let us know if you have any questions.