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# New Twist in the Federal Contractor COVID-19 Vaccine-Mandate Saga


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

In case anyone has forgotten, there are still a few COVID-19 vaccine mandates out there that the Supreme Court has not struck down. There are the federal *employee* and *military* vaccine mandates, and for private employers, the federal *contractor* vaccine-mandate. The federal contractor mandate arose from Pres. Biden's Executive Order 14042, which directed executive agencies to include a clause in procurement agreements requiring employees who work on or in connection with a covered federal contract, or who even share a workplace with another employee who does, to be fully vaccinated against COVID-19.

You may have forgotten about that federal contractor vaccine mandate because that requirement has been the subject of nationwide temporary injunction for the last nine months, following a [decision in December 2021 by a federal district court judge in Georgie in a legal challenge captioned \*Georgia v. Biden\*](#), one of several legal challenges to the Biden Administration's authority to mandate the COVID-19 vaccine through the 1949 Federal Property and Administrative Services Act (aka the Procurement Act). The district court judge in *Georgia v. Biden* entered a nationwide preliminary injunction after concluding that the plaintiff States and one trade association were likely to prevail on their assertion that the mandate was outside the scope of the Procurement Act. The judge ordered the federal government not to enforce the mandate in any covered agreement, and several other federal courts have also imposed other, though narrower, restrictions on EO 14042. Since then, the Administration has shelved the vaccine requirement for federal contractors. 

A lot of water has also passed under the bridge since that time, and the COVID-19 landscape has changed pretty significantly. Most notably, the [CDC recently updated its COVID-19 guidance](#) in several ways, but most relevant to the federal contractor vaccine mandate, the

CDC now no longer distinguishes between vaccinated and unvaccinated individuals for how COVID-19 controls should apply. For example, quarantine and isolation requirements are perfectly aligned for fully vaccinated, partially vaccinated, and completely unvaccinated individuals. The rationale for the new relaxed guidance from Pres. Biden's CDC is that there are now "so many tools available to use for reducing COVID-19 severity, [so] there is significantly less risk of severe illness, hospitalization and death compared to earlier in the pandemic." That rationale would seemingly undermine the original purpose of the federal contractor vaccine mandate - ensuring "economy and efficiency" of the federal procurement system by ensuring the health of the contracting workforce.

Nevertheless, the Administration has continued to defend the federal contractor vaccine mandate as the legal challenges to EO 14042 have moved through the court system. **The latest development in that litigation came in yet another Friday night COVID-19 surprise, this past Friday, August 26, 2022, when the [11<sup>th</sup> Circuit issued a decision](#) that would best be described as a mixed bag for federal contractors. In a 2-1 vote, a three judge panel on the 11<sup>th</sup> Circuit, based in Atlanta, GA, "agree[d] that the plaintiffs' challenge to the mandate will likely succeed and that they are entitled to preliminary relief. Even so, because the injunction's nationwide scope is too broad, [the court] vacate[d the injunction] it in part."** The 11<sup>th</sup> Circuit agreed with several lower courts that have held that Pres. Biden likely lacked authority to mandate the COVID-19 vaccine for federal contractor employees, but the panel disagreed with the district court judge's decision to issue a preliminary injunction that blocked the mandate *nationwide*. The 11<sup>th</sup> Circuit effectively narrowed the scope of the injunction, barring the Administration, at least temporarily, from enforcing the mandate in contracts with the State of Georgia and six other states that brought the case, and in contracts with members of the Associated Builders and Contractors, a national construction trade group that is also a plaintiff in the legal challenge. 

The decision, however, is hardly a resounding victory for the Biden Administration. While the three-judge panel's majority found that the district court judge went too far with his nationwide injunction, it still found that a narrower injunction is still warranted, and more importantly, announced that once the full merits of the legal challenge was litigated, the plaintiffs are at least "reasonably likely" to prevail on their claim that the vaccine mandate is not lawful under the Procurement Act:

*"Here, the district court relied on improper considerations to justify its nationwide injunction. . . . It emphasized that members of Associated Builders and Contractors are*

*located ‘all over the country,’ and that, in recent years, they were collectively awarded most federal construction contracts. Stretching logic, the court reasoned that if it ‘were to enjoin the enforcement of the mandate only in the Southern District of Georgia or only in Georgia, Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia,’ then ‘members would not have injunctive relief as to covered contracts in other states.’ But injunctive relief operates on specific parties, not geographic territories, and identifying the plaintiff states and trade association members is possible.”*

The 11<sup>th</sup> Circuit panel was unanimous in finding that the district judge abused his discretion by applying the preliminary injunction nationwide, but the three judge panel was otherwise split on the underlying issue – whether the Procurement Act gives the President enough discretion over government acquisition policy to mandate public health measures. Judge Edmonson’s concurring opinion found that the plaintiffs had a “reasonable” chance of proving at trial that it does not. Judge Grant, however, was more confident that the vaccine mandate was unlawful: *“The act confers broad but not unbounded authority . . . . Nothing in the act contemplates that every executive agency can base every procurement decision on the health of the contracting workforce. Instead, the statutory scheme establishes a framework through which agencies can articulate specific, output-related standards to ensure that acquisitions have the features they want.”* And Judge Anderson, in his partial dissent found that the Administration does have authority to issue the mandate: *“The Procurement Act very clearly grants to the president the authority to include in the contract provisions designed to result in the government work being performed by persons qualified to complete the work in a competent and timely manner. . . . Because the vaccination requirement has such a close nexus to best assuring that the government work will be completed without delay and in a timely manner, it seems to me that it falls comfortably within the clearly authorized powers delegated to the president.”*

**As a result of the 11<sup>th</sup> Circuit’s decision this Friday, the federal contractor vaccine mandate *can* go back into effect, at least for now, and *can* mandate the vaccine for all federal contractor employees except for the specific plaintiffs who were a party to the legal challenge heard in the *Georgia v. Biden* case, and except for any federal contractors operating in certain other states where other district courts have blocked enforcement of the vaccine mandate, including Alaska, Arkansas, Iowa, Kentucky, Minnesota, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, South Dakota, Tennessee, and Wyoming. The Administration, which suspended enforcement of the federal contractor vaccine mandate right after the district court’s decision last**

**December, has not yet shared how it will respond to the new ruling.**

We will keep our eyes peeled for word from the Administration about whether it will take this semi-victory in the 11<sup>th</sup> Circuit as an opportunity to begin pushing the vaccine mandate into new procurement agreements and/or enforce such provisions that were put in place before the nationwide injunction was issued in December. In the meantime, [let us know](#) if you have any questions.