

This is an emerging development in the federal contractor vaccine mandate, and as we are observing with the OSHA emergency temporary standard, more legal rulings can be expected before this outcome is concluded. Below is a client alert by the firm Wiley Rein LLP.

On November 30, 2021, a federal judge in Kentucky granted a preliminary injunction against the “vaccine mandate” for federal contractors (the central obligation under President Biden’s Executive Order 14042) as it relates to covered contracts in Kentucky, Ohio, and Tennessee. U.S. District Judge Gregory F. Van Tatenhove framed the vaccine mandate as a likely overreach of the President’s statutory and constitutional powers (non-delegation doctrine and the Tenth Amendment):

“The question presented here is narrow. Can the president use congressionally delegated authority to manage the federal procurement of goods and services to impose vaccines on the employees of federal contractors and subcontractors? In all likelihood, the answer to that question is no.”

The case is Commonwealth of Kentucky et al. v. Biden et al., 3:21-cv-00055, and it is currently pending in the U.S. District Court for the Eastern District of Kentucky.

In the 29-page opinion and order, the Court acknowledged that the vaccine mandate affected federal contractors and subcontractors across the U.S., but expressly limited the scope of the preliminary injunction to the “the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee.”

Impact on Industry: A preliminary injunction is not a dispositive finding on the substance of a case, only an initial determination that the party seeking the injunction is reasonably likely to succeed on the merits. **Thus, the Kentucky federal court’s ruling is only the beginning of that case.** The parties will now begin briefing and arguments to determine whether the Court will issue an order permanently enjoining the federal government from enforcing the vaccine mandate.

In the meantime, contractors face some uncertainty about this injunction’s scope. One area of uncertainty is geographic. **The order and opinion leave unclear whether the Court has barred enforcing the vaccine mandate on (a) contractors located in the three states; (b) contracts under performance in those three states; or (c) some combination of the two.** Further complications arise regarding this injunction’s application to subcontractors and to indirect support employees covered by the vaccine mandate because they work “in connection with” covered contracts: both groups can often work far from the prime contract’s place of performance.

Another area of uncertainty is the extent to which this injunction bars enforcement of the vaccine mandate beyond the requirements for vaccination. The plaintiffs’ briefing and the Court’s decision focused on the “vaccine mandate” without expressly addressing other requirements set by the Safer Federal Workforce Task Force, such as masking and social distancing. To be sure, those requirements have not drawn attention or objections to anywhere near the degree of the vaccination requirement. However, many contractors may still wish to know whether they are (or can be) contractually obligated to follow those other requirements.

The Kentucky federal court may clarify its preliminary injunction to address one or both of these areas of uncertainty. **Unless and until that occurs, contractors may well be served by raising these issues with their contracting officers and higher-tier contractors proactively to reach a mutual understanding about their contracts and subcontracts that have a nexus with KY, OH, and TN.**

Contractors should also bear in mind that this injunction does not prevent employers from imposing their own vaccination mandates. As we discussed in a December 2020 alert, employers can still require employees to get vaccinated independent of a contractual provision or flow down, subject to state law. Employers that operate in KY, OH, and TN should carefully consider how to proceed concerning existing vaccination policies and whether they are subject to any state laws or other contractual obligations that may impact their decisions regarding the enforcement of such policies.

Federal contractor employers that operate elsewhere in the U.S. should continue to comply with their contractual obligations and consult counsel before taking any action that could lead to potential legal liability. Employers also should continue to consult with counsel and monitor legal developments nationally (particularly the more than 25 other challenges pending to the vaccine mandate) and in the states where they operate to ensure that they fully understand their legal rights and obligations concerning the vaccine mandate.

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