

## Ongoing Uncertainty Surrounds COVID-19 Vaccine Mandates for Government Contractors

Alert

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By Susan Warshaw Ebner and Luke VanFleteren

The patchwork collection of state and federal requirements applicable to COVID-19 vaccination continues to remain in flux. Beginning December 2021, there was a nationwide stay in the implementation of Executive Order 14042's (EO 14042) vaccination mandate for federal contractors. However, on August 26, 2022, the Eleventh Circuit Court entered an [opinion](#) upholding the injunction—which halts enforcement activity of EO 14042's vaccination requirements — but limiting the reach of the injunction to only those states and trade association (the Associated Builders and Contractors) that were parties to the suit, and to federal contracting decisions involving those parties:

"We AFFIRM the district court's order to the extent that it enjoins federal agencies from enforcing the mandate against the plaintiffs—the seven plaintiff states and their agencies and members of Associated Builders and Contractors—and to the extent that it bars the federal government from considering a bidder's compliance with the mandate when deciding whether to grant a contract to a plaintiff or to a nonparty bidder."

Since issuance of the Eleventh Circuit decision, the Safer Federal Workforce Task Force has provided two separate updates regarding implementation of EO 14042. Most recently, the [task force](#) and the [Office of Management and Budget](#) (OMB) published guidance confirming that the Eleventh Circuit's ruling took effect on October 18, 2022, meaning that the government contractor vaccine mandate was no longer enjoined by court order across the nation, but instead it was only enjoined in "some locations and as to some entities" covered by specific active court orders to that effect. However, the federal guidance states:

"Despite the lifting of the nationwide bar to enforcement on October 18, 2022, at this time agencies should NOT: (1) take any steps to require covered contractors and subcontractors to come into

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compliance with previously issued task force guidance; or (2) enforce any contract clauses implementing Executive Order 14042. To allow time to develop advice and processes for meeting agencies' obligations under Executive Order 14042 and the applicable court orders, agencies should follow the instructions provided in the [OMB guidance](#)."

The publication and referenced OMB guidance indicate that the task force intends to further update its guidance regarding whether, and to what extent, clauses and contractor vaccination requirements will be enforced in existing contracts or put into new solicitations and contracts. However, the OMB guidance makes clear that the task force's COVID-19 safety protocols for covered contractor and subcontractor workplace locations remains in effect. Any changes as a result of the anticipated updated task force and OMB guidance will include a timeline for implementation by contractors and subcontractors.

This guidance comes against the backdrop of President Biden declaring that "the pandemic is over. We still have a problem with COVID. We're still doing a lot of work on it. But the pandemic is over." Precisely what the new guidance will entail, and whether vaccinations will continue to be required under the same terms as earlier guidance, remains to be seen.

Uncertainty regarding the future of vaccine mandates is not limited to what is happening at the federal level. Additionally, ongoing COVID-19 vaccine litigation continues at the state and federal levels. On October 24, 2022, a New York state court judge held that New York City's vaccination requirements for public and private sector employees impermissibly violated the Separation of Powers doctrine. In that case, the Court [noted](#), "[t]here is nothing in the record to support the rationality of keeping a vaccination mandate for public employees, while vacating the mandate for private sector employees or creating a carveout for certain professions, like athletes, artists and performers. This is clearly an arbitrary and capricious action because we are dealing with identical unvaccinated people being treated differently by the same administrative agency." The Court further drew a distinction between "temporary vaccination orders during a public health emergency" and indefinite orders, which may "usurp[] the power of the legislature." While this ruling was confined to a specific group of employees, should issues persist regarding COVID-19 vaccination requirements, it is possible that courts could employ similar reasoning in future decisions.

This New York order is not the only recent order which reflects the diverging scope of provisions and positions on COVID-19 precautions. On October 6, 2022, the Eleventh Circuit held that a Florida statute, which prohibits businesses operating in Florida from requiring customers to provide proof of vaccination, did not violate either the free speech or commerce clauses of the Constitution. In so holding, the majority characterized the statute (referred to at times as a "vaccine passport law") as an "anti-discrimination statute" which "protect[s] [Florida] residents from economic ostracism based on their hesitancy to divulge to businesses private medical information."

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The foregoing makes clear that there are likely to be further developments and changes in this area that will impact employers and employees of all types. Developments need to be tracked closely in the coming months. Changes to the mandates may impose new requirements and costs. Addressing these changes requires care and consideration.

For more information on COVID-19 vaccine mandates for government contractors, please [Susan Warshaw Ebner](#), [Luke VanFleteren](#) or a member of Stinson's Coronavirus Task Force.

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