

Publications

Court Blocks Federal Contractor Vaccine Mandate in Kentucky, Ohio, and Tennessee

Related Attorneys

Robert A. Harris

Benjamin A. Shepler

Charles F. Billington III

Michael C. Griffaton

Related Services

Employment Counseling

Labor and Employment

CLIENT ALERT | 12.1.2021

On November 30, 2021, a federal district court in Kentucky temporarily blocked the federal contractor vaccine mandate from taking effect in Kentucky, Ohio, and Tennessee.

As we previously reported, President Biden issued Executive Order 14042 in September 2021 requiring that all employees (with limited exceptions) working on or in connection with covered federal government contracts be fully vaccinated against COVID-19. The Safer Worker Federal Workforce Task Force then issued its *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* implementing the Executive Order and mandating that such employees be fully vaccinated. The mandate applies to procurement contracts for services, construction, and concessions that exceed \$250,000.

The states of Kentucky, Ohio, and Tennessee sued, arguing the Executive Order exceeded Presidential authority. The court agreed, finding it likely that the President had exceeded his delegated authority under the Federal Property and Administrative Services Act (FPASA), which generally empowers the President to manage federal procurement. The Court further noted potential constitutional concerns under the nondelegation doctrine and the Tenth Amendment.

However, the court declined to issue a nationwide injunction, instead expressly restricting the injunction to the three states who are parties to the case. The court's order reads: "The government is enjoined from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee."

Practically speaking, the exact scope and reach of the injunction are unclear because the court does not define what it means for a "covered contract" to be "in" Kentucky, Ohio, or Tennessee.

A covered contract worked on by employees solely in Kentucky, Ohio, and/or Tennessee would be subject to the injunction. Thus, it seems reasonably clear the vaccination mandate would not apply to them.

But consider these likely scenarios (and there are certainly others):

- An Ohio company's covered contract is also being worked on by employees in its California facility.
- An Ohio company subcontracts all work on its covered contract to be entirely performed by employees in Michigan.
- A Kentucky company's covered contract is also being worked on remotely by some employees from their homes in New York.
- Human resources, legal, or billing services are being provided from a company's headquarters in Florida in connection with a covered contract otherwise being performed by the company's employees in Tennessee.
- A Missouri company subcontracts its covered contract work to an Ohio company to be partially performed by employees in Ohio.

In each case, it is currently unclear whether the out-of-state employees are covered by the injunction. The language of the court's order seems to contemplate the injunction being enforced on a *contract* basis, which would suggest that no work being done on the contract could be covered by the mandate while the injunction is in place. However, that takes us right back to the question of what does it mean to say the contract is "in" one of these three states? As these examples illustrate, the injunction's parameters are not clear, and businesses will need to assess on a case-by-case basis whether their covered contracts are still subject to the vaccine mandate, and likely assess their business risk associated with potentially more than one viable answer to that question.

The Vorys COVID Task Force will provide further insights as litigation and the ultimate fate of the Executive Order plays out. In the interim, contact your Vorys lawyer if you have questions about the federal contractor vaccine mandate or other COVID-related requirements or concerns.

—

VORYS COVID-19 TASK FORCE

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at [vorys.com/coronavirus](https://www.vorys.com/coronavirus).