

Federal Contractor Vaccine Mandate Blocked in Three States

Related Professionals

David E. Dubberly
803.253.8281
ddubberly@maynardnexsen.com

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On November 30, 2021, Judge Van Tatenhove of the U.S. District Court for the Eastern District of Kentucky issued a preliminary injunction blocking enforcement of the federal contractor COVID-19 vaccine mandate in Kentucky, Ohio, and Tennessee.

Judge Van Tatenhove's order is an interesting development in terms of the enforceability of the various federal vaccine mandates announced in recent months by President Biden because the executive branch's authority is considered broad when it comes to federal procurement. Generally, a president's authority to require agencies to impose certain conditions on federal contractors as terms of their contracts is expansive.

In granting the preliminary injunction, the court, however, found that the mandate likely exceeds President Biden's authority over federal procurement. The court noted that the president's authority over federal procurement is broad, but is "not absolute."

The contractor mandate is far-reaching and requires inclusion of a new clause in covered federal contracts and subcontracts that requires the contracting business to comply with certain COVID-19 safety protocols, including employee vaccinations with no testing alternative, even for fully remote employees.

In deciding to enjoin enforcement of the mandate, the court noted that the issue presented was not whether or not vaccines are effective, but instead involved the narrow question of: "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?" The court found that: "In all likelihood, the answer to that question is no."

This is, of course, a limited district court order which will almost certainly be appealed. Kentucky, Ohio, and Tennessee are within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit (together with Michigan). The Sixth Circuit recently won the “multi-jurisdiction lottery” and was assigned the consolidated challenges to OSHA’s “large employer” federal vaccination mandate. That matter is still in the briefing stage before the Sixth Circuit, but the OSHA mandate remains stayed based on a Fifth Circuit order issued prior to the “lottery.” An appeal of the recent injunction as to the federal contractor mandate would also go to the Sixth Circuit.

Nexsen Pruet’s Employment and Labor Law Team is closely monitoring the mandates, cases, and challenges and we regularly advise employers on best practices as it relates to COVID-19. Please contact one of our Team’s lawyers if you need assistance with these issues.