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GovCon Alert

# Executive Order 14042 - Update 12.0
# U.S. District Court Issues Nationwide Injunction

By: The Sheppard Mullin Government Contracts Team*

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Federal contractors and subcontractors across the country were forced to rethink their COVID-safety efforts when, on December 7, the U.S. District Court for the Southern District of Georgia enjoined enforcement of Executive Order 14042 nationwide. EO 14042, as most know by now, imposed vaccination, masking, and physical distancing requirements on domestic federal contractors and subcontractors. The Georgia District Court Order goes well beyond the prior federal court injunction that prohibited enforcement of the EO only in Kentucky, Ohio, and Tennessee.

The Georgia decision (formally captioned *The State of Georgia v. Joseph Biden*, 1:21-cv-163) is the result of a complaint filed by the states of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, and West Virginia. Subsequently, the Court permitted a nationwide trade association (Associated Builders and Contractors, Inc., or ABC) to intervene as a plaintiff as well. The decision to permit ABC to intervene proved particularly impactful in that the Court relied on the national membership of ABC as the basis for applying its injunction nationwide.

## *The Immediate Impact of Georgia v. Biden*

The impact of the decision will be felt immediately by contractors, subcontractors, and federal agencies.

In short, at least for the time being, the Government may not enforce either the Executive Order or the contract clauses issued pursuant to the Executive Order in any U.S. state or territory. While the injunction does not prohibit contractors from *voluntarily* continuing to follow the Guidance of the Safer Task Force – or from mandating vaccines for their employees – as we noted in our prior Alert, contractors in states that prohibit vaccine mandates (or prohibit employers from requesting proof of vaccination or enforcing mask mandates) do so at great risk. Now that the EO is unenforceable (again, at least for the time being), the EO no longer preempts contrary state laws. Thus, mandating vaccinations in Tennessee or Montana, for example, now will run afoul of state law, whereas, previously, those state laws would have been preempted by the EO.

Similarly, and also as we discussed in our prior Alert, unionized companies likewise will need to think twice before continuing voluntarily to adhere to the Task Force Guidance, even if permitted under state law. While a mandatory compliance obligation likely is not required to be collectively bargained, a voluntary decision to enforce safety guidance probably is.

Against this background, federal contractors now must recalibrate their COVID safety compliance plans. For large contractors looking for a uniform, nationwide policy, suspending the implementation of EO 14042 is the only realistic option at this point. For contractors wishing to continue processing vaccine cards, care must be taken to ensure compliance with applicable state laws (*e.g.*, Tennessee prohibits employers from taking an "adverse employment action" against anyone who refuses to provide proof of vaccination).

Regardless of the changes made, contractors should be sure to communicate their new plan to employees promptly. Contractors also should consider sending a communication to subcontractors, or, at least, putting a pause on incorporating the new FAR/DFARS clause into subcontracts.

We know many contractors and subcontractors have been working their way through a sizeable volume of religious/medical exemption requests over the past few months. There is no prohibition against continuing to process such requests, but be sure not to take action that violates state law (remember, unlike the EO, some states authorize exemption requests based on "personal conscience" or other non-religious/medical bases).

Finally, contractors in possession of contracts, orders, solicitations, modifications, renewals, or other "contract-like instruments" incorporating the new FAR/DFARS clause are well within their rights to take exception to the incorporation of the clause. Shortly after the Kentucky decision, Federal agencies released guidance stating they no longer would incorporate the mandate in contracts with performance occurring in those three states. Given the Georgia decision, we are confident similar nationwide guidance will be forthcoming.


## *Scope: Vaccination Mandate, Masking/Distancing, or Both?*

Unlike the Kentucky Court Order, the Georgia Order leaves no confusion as to its geographic scope – it applies to "all covered contracts in any state or territory of the United States of America." However, the Order is surprisingly imprecise as to what specifically was enjoined. In other words, does the injunction apply only to the vaccination mandate, or does it apply to the EO as a whole (including the masking/distancing requirements).

The Order enjoined the Government from "enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts." The Order did not expressly enjoin enforcement of EO 14042, FAR 52.223-99, or DFARS 252.223-7999. Thus, we are left to guess as to the proper interpretation of the scope of the injunction – particularly, whether the injunction applies only to the vaccination mandate or more broadly to EO 14042 and the implementing contract clauses.

We would argue the injunction applies not only to the vaccination requirement, but also to the masking/physical distancing requirements of the EO and contract clauses. We think this for three reasons.

- *First*, the plaintiffs requested an injunction of the "Contractor Mandate," which the one plaintiff that chose to define the term defined as "***Executive Order 14042*** and its implementing regulations." (Emphasis ours.) The Court granted this motion, and, therefore, despite the inexact language, seems to have enjoined all aspects of EO 14042.
- *Second*, it stands to reason (to us at least) that if the President lacks the authority to use the Procurement Act to issue a public health mandate for vaccinations, he probably also lacks the authority to issue a public health mandate for masking/distancing. (Although, we concede, there is an argument that the Balancing of the Harms and Public Interest prongs of the TRO/PI standard may not come out the same absent a vaccination mandate.)
- *Third*, we think it would make little practical sense for the Government to enforce the masking/physical distancing requirements with the vaccination mandate on hold. Indeed, various Government entities already have stated, repeatedly, that they would not be actively enforcing compliance with EO 14042. We think the addition of a federal court injunction, unclear though it may be, will only solidify the Government's view that enforcement should wait.

In short, we think the entire EO is on hold, and contractors now should follow all applicable non-EO 14042 guidance on masking and distancing (*e.g.*, state, local, CMS). We are hopeful the Task Force updates the official Guidance soon to provide a definitive answer to the outstanding scope question.

## *The Decision*

Judge Baker began his decision by quoting his Kentucky colleague Judge Van Tatenhove: "This case is not about whether vaccines are effective. They are." "However," he went on, "even in times of crisis this Court must preserve the rule of law and ensure that all branches of government act within the bounds of their constitutionally granted authorities." To preserve the rule of law here, Judge Baker found it necessary to grant plaintiffs' motion for a preliminary injunction.


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Finding that the plaintiff States and the ABC all had standing to bring their challenge to the EO, Judge Baker, like Judge Van Tatenhove, focused his decision on the *likelihood of success on the merits* prong of the TRO/PI standard. Noting that plaintiffs "need only show a substantial likelihood of success on the merits on ***one*** claim" (emphasis added), he went about examining the plaintiffs' contention that the EO exceeded the authority granted to the President by the Procurement Act (more formally known as the Federal Property and Administrative Services Act, 40 U.S.C. §101).

The standard under which Judge Baker reviewed the EO was key to his ultimate decision. The question, according to Judge Baker, was whether Congress "clearly" authorized the President to use the Procurement Act to issue the directives contained in EO 14042. Finding the actual purpose of the EO to be the "regulation of public health," Judge Baker answered that question in the negative.

Judge Baker explained (correctly) that the purpose of the Procurement Act is to promote economy and efficiency in the federal procurement process. While recognizing the Procurement Act affords the President significant deference to achieve this goal, Judge Baker noted the Act does not give the President unfettered powers. "[T]hat deference was expressly *not* intended to operate as a 'blank check

for the President to fill in at his will.'" Finding an insufficient nexus between the Procurement Act and the EO, Judge Baker concluded that the Procurement Act "did not clearly authorize the President to issue the kind of mandate contained in EO 14042, as EO 14042 goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting, and instead, in application, works as a regulation of public health, which is not clearly authorized under the Procurement Act."

Unlike Judge Van Tatenhove, Judge Baker did not resolve (one way or the other) the other challenges raised by the plaintiffs – specifically, arguments centered on the Administrative Procedure Act and the Non-Delegation Doctrine. One basis for enjoining the Executive Order was enough for him.

Beyond the *likelihood of success on the merits* prong of the TRO/PI standard, Judge Baker found that plaintiffs were likely to be irreparably harmed if the EO was permitted to continue in force, and also found that the balancing of the harms favored plaintiffs over defendants. Judge Baker's decision no doubt was driven, in part at least, by his finding that plaintiffs would have a "laborious undertaking" to comply with the EO.

The most notable difference between the Kentucky Order and the Georgia Order is the scope of the injunctive relief. Judge Van Tatenhove limited the scope of his Order to contracts in Kentucky, Ohio, and Tennessee. He included a very thoughtful discussion explaining his decision in that regard. In contrast, Judge Baker applied his injunction nationwide. According to Judge Baker, plaintiff ABC has members "all over the country." Having let ABC intervene, he then used ABC's involvement to justify the nationwide scope of the injunction. "On the unique facts before it," he wrote, "the Court finds it necessary, in order to truly afford injunctive relief to the parties before it, to issue an injunction with nationwide applicability."

Accordingly, Judge Baker ordered the United States enjoined "during the pendency of this action or until further order of this Court, from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in any state or territory of the United States of America."

## *What's Next*

The Georgia decision, like the Kentucky decision, will be appealed – and then appealed again. The Supreme Court ultimately will decide the fate of EO 14042. Until then, federal contractors and subcontractors should consider taking the following steps:

- Reevaluate your compliance plans and give serious consideration to pausing all EO 14042 compliance efforts;
- Pause efforts to incorporate the FAR/DFARS clause throughout your supply chain;
- Research the laws applicable in the states where your employees work to ensure you do not run afoul of those prohibitions, whatever your updated compliance plans may look like; and
- Send a communication to employees providing an updated status on your company's updated policy.

We'll keep you posted as these decisions make their way through the appeals process. Stay tuned for additional updates, which will be reflected in our EO 14042 Survival Guide.

## Questions? Contact:

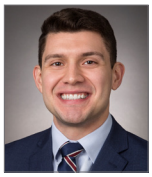

**Jonathan Aronie**
*Partner, Washington, D.C.*
202.747.1902
jaronie@sheppardmullin.com

**Ryan Roberts**
*Partner, Washington, D.C.*
202.747.2187
reroberts@sheppardmullin.com

**Anne Perry**
*Partner, Washington, D.C.*
202.747.1913
aperry@sheppardmullin.com

**Nikki Snyder**
*Associate, Washington, D.C.*
202.747.3218
nsnyder@sheppardmullin.com

**Emily Theriault**
*Associate, Washington, D.C.*
202.747.2190
etheriault@sheppardmullin.com



**Dany Alvarado**
*Associate, Washington, D.C.*
202.747.2325
dalvarado@sheppardmullin.com