

Government Contracts

Court Enjoins Enforcement of Federal Contractor Vaccine Mandate in Kentucky, Ohio, and Tennessee



By: [Scott E. Whitman](#), [Sati Harutyunyan](#), and [Matthew L. Haws](#)

On November 30, 2021, the United States District Court for the Eastern District of Kentucky issued an [order](#) (PI Order) enjoining the federal government from enforcing the federal contractor vaccine mandate “in all covered contracts in Kentucky, Ohio, and Tennessee.” As contractors develop their compliance plans for this mandate, this significant development may indicate how similar challenges pending in other federal district courts will fare. (See our prior alerts on [Executive Order 14042](#) (EO) and the Task Force Guidance [here](#), [here](#), and [here](#).)

Background

On November 4, 2021, the states of Kentucky, Ohio, and Tennessee filed a [federal complaint](#) seeking a preliminary injunction to prevent the federal government from enforcing the vaccine mandate. The states alleged that the vaccine mandate was unlawful under the Administrative Procedure Act and unconstitutional.

The PI Order

On November 30, 2021, the district court granted the preliminary injunction and ordered that “[t]he Government is enjoined from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee.” PI Order at 29. The court noted that, although vaccines are effective and the government may, at times, mandate vaccinations for the public interest, the President likely may not use “congressionally delegated authority to manage the federal procurement of goods and services to impose vaccines on the employees of federal contractors and subcontractors.” *Id.* at 1. In reaching its decision, the court found that the vaccine mandate likely exceeds the President’s delegated authority for federal procurement, including because it: (1) effectively amounts to a sweeping public health regulation, which is beyond the scope of authority delegated to the President under the Federal Property and Administrative Services Act (FPAS); (2) violates the Competition in Contracting Act (CICA); and (3) violates the 10th Amendment by regulating noneconomic activity (*i.e.*, choice to remain unvaccinated) that falls within the States’ police power. *Id.* at 14–20.

The court’s FPAS and CICA analyses are particularly significant for government contract regulation more broadly, and the court’s logic could be extended far beyond the vaccine mandate. For example, in determining that the vaccine mandate likely violates CICA, the court looked to the recent United States Court of Appeals for the Federal Circuit’s decision in [Nat’l Gov’t Servs. Inc. v. United States](#), [923 F.3d 977, 985 \(Fed. Cir. 2019\)](#), and concluded that “Defendants may run into the same problem [as occurred in NGS]: contractors who ‘represent[] the best value to the government’ but choose not to follow the vaccine mandate would be precluded from effectively competing for government contracts.” *Id.* at 15 (quoting 923 F.3d at 990).

The Court considered whether it should issue a nationwide injunction, but chose not to, in deference to the authority of other federal district courts and to prevent forum shopping. *Id.* at 27–28.

What Now?

There are preliminary injunction hearings scheduled in several other challenges to the contractor vaccine mandate over the next week, including before the Southern District of Georgia (December 3) and the Middle District of Florida (December 7). While this PI Order does not apply nationwide, it provides one roadmap for courts in other districts to consider in evaluating similar lawsuits. Notably, as the PI Order alluded to, at least one federal court has dismissed a challenge to the vaccine mandate by individuals for lack of standing. [Hollis v. Biden, 2021 WL 5500500 \(N.D. Miss. Nov. 23, 2021\)](#).

With the rapidly approaching January 18 deadline, contractors will be watching closely as each decision adds to the complexity of vaccine mandate compliance plans and policies. Jenner & Block continues to follow closely these developments and to assist our clients in applying the requirements to their unique situations.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

[Click here to visit our COVID-19 / Coronavirus Resource Center](#)



Contact Us



Scott E. Whitman

swhitman@jenner.com | [Download V-Card](#)



Sati Harutyunyan

sharutyunyan@jenner.com | [Download V-Card](#)



Matthew L. Haws

mhaws@jenner.com | [Download V-Card](#)

[Meet Our Team](#)

Practice Leaders

David B. Robbins

Co-Chair

[drobbins@jenner.com](mailto:d Robbins@jenner.com)

[Download V-Card](#)

Marc A. Van Allen

Co-Chair

mvanallen@jenner.com

[Download V-Card](#)

© 2021 Jenner & Block LLP. **Attorney Advertising.** Jenner & Block LLP is an Illinois Limited Liability Partnership including professional corporations. This publication is not intended to provide legal advice but to provide information on legal matters and firm news of interest to our clients and colleagues. Readers should seek specific legal advice before taking any action with respect to matters mentioned in this publication. The attorney responsible for this publication is Brent E. Kidwell, Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654-3456. Prior results do not guarantee a similar outcome. Jenner & Block London LLP, an affiliate of Jenner & Block LLP, is a limited liability partnership established under the laws of the State of Delaware, USA and is authorised and regulated by the Solicitors Regulation Authority with SRA number 615729. Information regarding the data we collect and the rights you have over your data can be found in our [Privacy Notice](#). For further inquiries, please contact dataprotection@jenner.com.