

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 8

NUMBER 2

February 2022

Editor's Note: Changes for Government Contractors Victoria Prussen Spears	37
Changes Are Coming to the Biden Administration's Federal Sustainability Plan Taite R. McDonald, Kelsey M. Hayes and Hannah M. Coulter	40
Federal Government Announces New Affirmative Action Plan Certification Requirements for Federal Contractors Sheila M. Willis and Samina Weil	44
U.S. Department of Labor Issues Final Rule Implementing Minimum Wage Increase for Federal Contractors Christopher D. Durham and Meredith Gregston	47
U.S. Justice Department Signals Intent to Hold Government Contractors Accountable for Lax Cybersecurity Standards Robert M. Duncan, Lindsay K. Gerdes and Michael B. Stuart	52
Continuing to Pull Back the Curtain on Federal Relief Abuses Mark F. Sommer and Elizabeth D. Mosley	56
Recent Decisions Highlight Extra Diligence Needed When Acquiring a Government Contractor Shlomo D. Katz	59
Federal Contractor Vaccine Mandate Now Blocked Nationwide: A Playbook for Federal Contractors and Subcontractors Cheryl L. Behymer and Hannah Sweiss	63
In the Courts Steven A. Meyerowitz	66

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169
Email: heidi.a.litman@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2015

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

MARY BETH BOSCO

Partner, Holland & Knight LLP

PABLO J. DAVIS

Of Counsel, Dinsmore & Shohl LLP

MERLE M. DELANCEY JR.

Partner, Blank Rome LLP

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFcoat

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

MARCIA G. MADSEN

Partner, Mayer Brown LLP

KEVIN P. MULLEN

Partner, Morrison & Foerster LLP

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

STUART W. TURNER

Counsel, Arnold & Porter

ERIC WHYTSELL

Partner, Stinson Leonard Street LLP

WALTER A.I. WILSON

Partner Of Counsel, Dinsmore & Shohl LLP

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Federal Contractor Vaccine Mandate Now Blocked Nationwide: A Playbook for Federal Contractors and Subcontractors

*By Cheryl L. Behymer and Hannah Sweiss**

A federal court in Georgia has granted an injunction that blocks the federal government from enforcing the federal contractor mandate, which aimed to require covered contractors and subcontractors to mandate COVID-19 vaccinations. The authors of this article review the court decision and offer contractors suggestions for dealing with the uncertainty.

“The Court ORDERS that Defendants are 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.”

With these words, a federal court in Georgia granted an injunction that blocks the federal government from enforcing the federal contractor mandate, which aimed to require covered contractors and subcontractors to mandate COVID-19 vaccinations (among other things) by January 18, 2022. What do federal contractors need to know about the ruling—and what should you be doing now that you are stuck in litigation limbo? This article reviews the court decision and presents you with a playbook for proceeding in the uncertainty.

THE BASICS ABOUT THE VACCINE MANDATE

Executive Order (“EO”) 14042, commonly called the “federal contractor vaccine mandate,” seeks to require federal contractors and subcontractors with covered contracts to:

- Require vaccination of their employees, unless they are exempt due to a medical condition, disability, or a sincerely held religious belief, practice, or observance;

* Cheryl L. Behymer is a partner in the Columbia, South Carolina, office of Fisher & Phillips LLP and co-chairs the firm’s Pay Equity Practice Group, as well as the Affirmative Action and Federal Contract Compliance Practice Group. She provides clients with counsel, training and audit defense in affirmative action, workplace harassment, employee leave issues involving the Family and Medical Leave Act and the Americans with Disabilities Act, and other labor and employment issues. Hannah Sweiss, an associate in the firm’s Woodland Hills/Los Angeles office, represents clients in a variety of industries including trucking, hospitality, travel, manufacturing and healthcare. The authors may be reached at cbehymmer@fisherphillips.com and hsweiss@fisherphillips.com, respectively.

- Comply with masking and social distancing in covered contractor workplaces; and
- Designate a COVID-19 workplace safety officer at covered contractor workplaces.

FIRST SHOTS FIRED

On November 30, this same mandate was blocked by another court order from a federal court in Kentucky. That decision, however, only covered employers in Kentucky, Ohio and Tennessee. Most observers felt it was just a matter of time before the same reasoning applied in the Kentucky case was used to justify a broader blockade. Sure enough, with the decision from Georgia, the mandate is blocked in nationwide until further notice.

THE COURT'S DECISION

The lawsuit that led to the court action was originally filed by seven states (Georgia, Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia) and various state agencies. Importantly, Associated Builders and Contractors, Inc. (“ABC”) filed a Motion to Intervene and filed its own Motion for Preliminary Injunction to stay EO 14042.

The Georgia court’s 28-page opinion quoted with approval the Kentucky case decided last week, saying that “this case is not about whether vaccines are effective. They are.” Stating that the most important legal component required to decide an injunction is the likelihood of success on the merits, the court found: “In this case, Plaintiffs will likely succeed in their claim that the President exceeded the authorization given to him by Congress through the Federal Property and Administrative Services Act [“FPASA”] when issuing Executive Order 14042.” This finding echoes the decision in the Kentucky case, which also found tenuous the connection between the FPASA and the vaccine mandate in the EO.

Unlike the Kentucky court’s decision which limited its holding to the three states, the Georgia decision bans the EO on a nationwide basis. The presence of the ABC in the Georgia case appears to be primary basis for the expanded stay. The court noted that all of ABC’s nationwide members would not have injunctive relief if the court limited its holding to the plaintiff states: “given the breadth of ABC’s membership, the number of contracts Plaintiffs will be involved with, and the fact that EO 14042 applies to subcontractors and others, limiting the relief to only those before the Court would prove unwieldy and would only cause more confusion.”

WHERE DOES THIS LEAVE FEDERAL CONTRACTORS AND SUBCONTRACTORS?

Any employer covered by the federal contractor mandate in any location across the country has been granted a temporary reprieve. The problem is that we do not know how “temporary” this reprieve will be, and how soon you may need to ramp up your compliance efforts if new life is breathed into the EO.

Additionally, it is important to keep in mind the various state or local restrictions or requirements that may apply to your workforce, including vaccine mandate restrictions, masking, social distancing and other requirements.

Therefore, you may want to take a cautious approach and perform some behind-the-scenes actions to prepare for a possible resurrected contractor vaccine mandate without unfurling major initiatives. Some steps to consider include:

- Establish a compliant written policy on vaccines and determine how you will enforce it should the EO come back in force.
- Plan for how to handle temporary and long-term employee loss.
- Provide information to employees on vaccines and their safety and effectiveness.
- Determine “how” to explain the pending court litigation and pending appeal(s), because many employees may assume that the EO rule is dead if they just glanced at headlines.
- Build a process (committee, outside providers, etc.) to evaluate requests for medical and religious accommodations.
- Recognize collective bargaining obligations if you are unionized.

WHAT’S NEXT?

This decision was issued by a single federal court judge in Georgia and could be overturned at any moment—perhaps putting you back on track to comply with the mandate.

What happens next is anyone’s guess. As noted above, we could see a federal appeals court weigh in to overturn these preliminary injunctions at any moment. Given the possibility for varied rulings in different areas of the country, we could see the Multidistrict Litigation Panel once again be called upon to assign this controversy to one federal appeals court for an overall ruling as happened with the Occupational Safety and Health Administration’s mandate-or-test Emergency Temporary Standard. And, of course, a trip to the U.S. Supreme Court for an ultimate decision is not out of the question.