

COURT BLOCKS FEDERAL CONTRACTOR VACCINE MANDATE IN KENTUCKY, OHIO, AND TENNESSEE

Insights
Dec 1, 2021

As a result of a somewhat surprising ruling from a federal court judge in Kentucky yesterday, the federal government is currently blocked from enforcing [the vaccine mandate for federal contractors and subcontractors](#) in all covered contracts in Kentucky, Ohio, and Tennessee. In his 29-page Opinion and Order enjoining the federal contractor COVID-19 vaccine mandate in those three states, Judge Van Tatenhove based his decision to grant the preliminary injunction on a narrow question:

Question: "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?"

Answer: "In all likelihood, the answer to that question is no."

What do federal contractors in Kentucky, Ohio, and Tennessee need to know about the November 30 ruling – and what (if anything) should contractors in the rest of the country do?

Quick Summary of Court Order

The state Attorneys General from Kentucky, Ohio, and Tennessee teamed together in early November to file an action in Kentucky challenging [the Biden administration's federal contractor vaccine mandate](#). The states argued that the establishment of the federal contractor vaccine mandate

Related People



Cheryl L. Behymer

Senior Counsel

803.255.0000



Hannah Sweiss

Partner

818.230.4255

was contrary to standard regulatory procedure, arbitrary and capricious, and violated the U.S. Constitution.

Court Concludes that Mandate Exceeds Presidential Authority

Much of the court's opinion addressed whether the imposition of the mandate, pursuant to Executive Order 14042, exceeded the president's authority under the Federal Property and Administrative Services Act (FPASA). Noting that the FPASA issue was difficult and had not previously been addressed in any of the federal courts in the Sixth Circuit (where the Kentucky federal court resides), the judge found that it "strains credulity" to believe that Congress intended FPASA to provide a basis for mandatory vaccination.

Noting that the vaccine mandate applies equally to remote employees and to outdoor employees – despite the fact that CDC guidance might suggest such requirements are not as necessary – the court raised another question: "Why couldn't the federal government refuse to contract with contractors and subcontractors who work in crowded indoor office spaces or choose to engage in indoor activities where COVID-19 is more likely to spread?" The Court answered this question by finding that the President exceeded his authority under the FPASA, by issuing the mandate.

The judge also said that "it would be reasonable to assume that a vaccine mandate would be more appropriate in the context of an emergency standard promulgated by OSHA," thus concluding that "neither OSHA nor the executive branch is permitted to exercise statutory authority it does not have." And the court further noted that the Defendants had not pointed to "a single instance when the FPASA statute has been used to promulgate such a wide and sweeping public health regulation as mandatory vaccination for all federal contractors and subcontractors."

Additional Procedural and States' Rights Rationale

Interestingly, in a footnote, the court stated that it did not find the states likely to succeed with their argument that the vaccination mandate violates the Spending Clause of the Constitution, at least at this early stage of the litigation. However, the court did find that the vaccine mandate did not follow Congressionally designed procedures to ensure the contractors providing government work represent "the best

Service Focus

**Government Contracting,
Compliance, and Reporting**

Workplace Safety

value to the government” because the mandate may preclude full and open competition for government work.

The court’s additional key argument concerned intrusion on “an area that is traditionally reserved to the States.” Citing liberally to the *BST Holdings, LLC* case – [the Fifth Circuit Court of Appeals decision that blocked the OSHA ETS mandate](#) – the court expressed “serious concern” that the vaccine mandate under Executive Order 14042 represented the federal government’s “stepping into an area traditionally reserved to the States.”

Scope of Ruling

Finally, the Court identified three options for how widely it would award injunctive relief blocking the mandate: (1) only the court’s own U.S. District Court in Kentucky; (2) the three states that had filed the action; or (3) all states, providing nationwide relief. Ultimately, although the court noted that the vaccine mandate affects all states, it determined to take the middle ground and confine its holding to federal contractors in Kentucky, Ohio, and Tennessee only.

What Does This Mean for Federal Contractors?

The result is that federal contractors and subcontractors covered by Executive Order 14042 and with operations in Kentucky, Ohio, and Tennessee are temporarily reprieved from complying with the vaccine mandate, while those employers operating in the remainder of the country continue to be obligated to follow the mandate – and have a January 18, 2022 compliance deadline looming.

Kentucky, Ohio, and Tennessee Employers

Nothing in yesterday’s court order prevents you from implementing a vaccine mandate. However, given the uptick in state law restrictions, you must remain cognizant of state laws that may limit your ability to implement a vaccine mandate. For example, [in Tennessee there are currently restrictions on vaccine mandates](#).

Also, if you were only establishing a workplace vaccine mandate because of the presidential order, you need to balance your risk tolerance level at this point in how to proceed. There is a chance that an appeals court could resurrect the vaccine mandate on short notice, and there is no telling whether the current deadlines will be altered or

whether you will have been expected to continue preparing during this temporary stay. Therefore, you may want to continue to take behind-the-scenes and preparatory action to position yourself to be ready to comply should the mandate be reinstated in these three states. These steps include:

- Evaluate if any of these requirements apply to your workforce.
- Designate a company representative to implement the Guidance.
- Determine how you will collect proof of vaccination, how proof of vaccination will be collected and kept, and who will have access to the confidential information.
- Communicate about the court order to your workforce, letting them know the stay is temporary in nature, that the court case will need to play out, and while you might not be taking action for the time being, you may need to move quickly to enforce compliance deadlines if those are reestablished.
- Consider related logistics, including compensation issues that may be implicated for the time spent traveling to and receiving the vaccine and any related reimbursement costs. Make sure you also understand when employees must be paid for their time, such as for time taken to receive the vaccine or to recover from vaccine side effects. Consider who is responsible for these costs. (Covered federal contractors are also those subject to the federal paid sick leave requirements).
- Be mindful of privacy laws when collecting and/or sharing information about employees.
- Review your accommodations policies and procedures regarding vaccinations, testing, and mask wearing and be prepared to engage in this process with employees and how you will consider handling requests from government agencies that only fully vaccinated workers will be allowed onsite.
- Ensure appropriate signage and notices regarding safety protocols are posted in the workplace and provided to employees.

All Other Employers Outside of Kentucky, Ohio, and Tennessee

For now, you need to press forward with compliance efforts, recognizing that you need to either require full vaccination or grant accommodation requests to all employees by January 18, 2022. [A full summary of your obligations and a plan of action can be found here.](#) While it is possible that further court rulings could come down in the coming days blocking this mandate in additional states or nationwide, outside of these three states, you must operate under the assumption that the mandate will take effect as scheduled. Unless or until the matter is fully litigated and finalized at federal appeals courts or the U.S. Supreme Court, we may continue to see the patchwork of state laws assume increasing importance in employers' compliance efforts. You will thus need to monitor this situation, and the best way to stay on top of these developments is to subscribe to [Fisher Phillips' Insight system](#).

Conclusion

As always, we will continue to monitor the situation regarding the federal contractor vaccine mandate and provide updates as warranted. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our [FP Vaccine Subcommittee](#) or our [Affirmative Action and Federal Contract Compliance Practice Group](#).