Proskauer

Eleventh Circuit Narrows Nationwide Injunction On President Biden's Contractor Vaccine Mandate

Law and the Workplace Blog on **September 1, 2022**

On August 26, the Eleventh Circuit issued its long-awaited decision in *State of Georgia, et al v. President of the United States, et al*, Case No. 21-14269. The Eleventh Circuit upheld, but narrowed, an existing nationwide preliminary injunction enjoining enforcement of President Biden's contractor and subcontractor vaccine mandate. Specifically, the Court upheld the injunction as it pertained to the plaintiffs, including the State of Georgia and Associated Builders and Contractors. However, the Court determined the lower court erred in issuing a nationwide injunction barring enforcement of the contractor mandate. Accordingly, the federal government may now enforce the mandate except where other courts have issued injunctions barring enforcement, such as in *State of Florida v. Nelson, et al.*, which blocked the mandate in any covered contract in Florida.

Background

On December 7, 2021, a federal judge issued a nationwide preliminary injunction halting enforcement of the federal contractor and subcontractor vaccine mandate requirements issued by the Safer Federal Workforce Task Force in response to President Biden's Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors (the "mandate"). The mandate required covered contractor employees to be fully vaccinated by January 18, 2022. To view a discussion of key developments in the case up to the Eleventh Circuit's decision, check out our blog here.

The federal government appealed the district court decision, challenging both the merits of the preliminary injunction and its scope.

The Eleventh Circuit Partially Upholds the Preliminary Injunction

The Court affirmed the lower court's decision that the plaintiffs are likely to succeed on their claim that the President exceeded his authority by issuing the mandate. Specifically, the Court explained that the Procurement Act (the "Act") does not delegate unbound authority to the President, but only allows the President to direct subordinate executive actors to carry out the Act's provisions. Therefore, "a presidential directive can stand only if those subordinate officials have the statutory authority they are told to exercise." The Court found that the President likely exceeded his authority under the Act when directing executive agencies to enforce the mandate, for President Biden directed subordinates to carry out activities likely beyond their own lawful statutory authority. The Court rejected the federal government's argument for a more expansive reading of the President's authority under the Act.

The Court then affirmed that the plaintiffs met the remaining requirements for a preliminary injunction. Specifically, the Court held that the lower court did not abuse its discretion when it concluded that the costs of complying with the mandate – including lost employees and the "time and effort" needed to identify which employees were covered – were unrecoverable, and therefore represented an irreparable harm. Likewise, the lower court did not err in balancing the plaintiffs' harm against the federal government and public's interests in the mandate's enforcement. While acknowledging that both sides made powerful cases, the Court pushed back against the federal government's arguments that extraordinary circumstances in part justified the mandate, concluding that "during times of crisis and calm alike, executive officials cannot take action founded on faulty claims of congressional authorization." The Court also determined that other resources for combating the virus and reducing costs were available to the government until courts made a final decision on the preliminary injunction.

The Eleventh Circuit Narrows the Existing Preliminary Injunction

While upholding the preliminary injunction as applied to the parties in this litigation, the Court determined that the *nationwide* injunction was "drastic" and not necessary to provide the plaintiffs relief. The Court specifically cautioned against nationwide injunctions premised on the need to protect nonparties, since those same nonparties can seek separate injunctive relief. Additionally, the Court observed that nationwide injunctions to serve the general interest of "national uniformity" contradict the deliberate nonuniformity built into the federal court system, which is intended to encourage "divergence of decisions." The Court concluded that Congress, and not the judiciary, is best positioned to choose when to create uniformity.

Accordingly, the Court held that the lower court relied on improper considerations to justify its nationwide injunction. Rejecting the district court's emphasis that members of Associated Builders and Contractors are located throughout the country and that, if it were to enjoin the enforcement of the mandate only in certain states then "members would not have injunctive relief as to covered contracts in other states," the Court held that injunctive relief operated on parties, not geographic territories, and that identifying the plaintiff States and trade association members was possible.

The Court further vacated the preliminary injunction in the procurement contract context "to the extent that it bars enforcement of the mandate against nonparty contractors through new and existing contracts," stating that extending the injunction to nonparties was unnecessary to provide complete relief to the plaintiffs. The Court noted the injunction will still block federal agencies from enforcing the mandate in contracts with any plaintiff State or member of Associated Builders and Contractors. *In the solicitation context*, the original injunction enjoined the government from enforcing the mandate in solicitations, regardless of whether a plaintiff was participating as a bidder. The Court left the solicitation aspect of the preliminary injunction in place to the extent that it bars federal agencies from considering the enforceability of the mandate when deciding who should receive a contract*, if any plaintiff belongs to the pool of bidders*.

Takeaways

With the narrowing of the nationwide injunction, the federal government may now enforce the contractor vaccine mandate except where barred by the Eleventh Circuit's decision or some other court ruling. As of today (September 1, 2022), the federal government had not changed its notice that it is not enforcing the vaccine mandate in any US state or territory.

We will continue to monitor this case and track the impact of this development. The full decision can be read here.

View Original

Related Professionals

- **Guy Brenner**
  Partner