

Fifth Circuit Affirms Injunction Preventing Enforcement of Contractor Vaccine Mandate Against Louisiana, Indiana, and Mississippi

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On December 19, 2022, the U.S. Court of Appeals for the Fifth Circuit affirmed a preliminary injunction halting enforcement of the federal contractor and subcontractor vaccine mandate requirements [issued](#) in response to [Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors](#) (the “federal contractor mandate”).

Louisiana, Indiana, Mississippi (the “Plaintiff States”), sought to enjoin enforcement of Executive Order 14042 with respect to contracts entered into between the three states and the federal government, as well as contracts between private contractors in those states and the federal government. On December 16, 2021, the District Court for the Western District of Louisiana granted an injunction barring enforcement of the federal contractor mandate because it determined the plaintiffs, inter alia, (i) had Article III standing to raise individual claims as federal contractors; and (ii) demonstrated the elements necessary to obtain injunctive relief. The court, however, declined to extend the scope of the injunction to non-plaintiff states or federal contractors.

On appeal, a divided Fifth Circuit panel upheld the preliminary injunction. Similarly to the district court, the appellate court declined to extend the preliminary injunction to private contractors within the Plaintiff States.

The Fifth Circuit held that the federal contractor mandate does not comport with the major questions doctrine, which “serves as a bound on presidential authority” and provides that an agency’s exercise of “powers of vast economic and political significance”—such as enacting a vaccine mandate—must be clearly granted by Congress. The court rejected the federal government’s argument that the federal contractor mandate bears a close nexus to the Procurement Act’s goal of promoting economy and efficiency in government contracting, finding instead that the federal contractor mandate is an “‘enormous and transformative expansion in’ the President’s power under the Procurement Act.”

The Court also found that the Plaintiff States sufficiently demonstrated that they would experience irreparable “nonrecoverable compliance costs” if required to comply with the federal contractor mandate, such as the cost of having to choose between firing valuable employees or foregoing federal contracts.

The Fifth Circuit also dismissed the federal government’s argument that delaying the mandate would result in productivity losses from schedule delays and employees being sick, isolating, or quarantined. In response, the Court cited to President Biden’s public comment that “[t]he pandemic is over” and held that regardless, “[t]here is generally no public interest in the perpetuation of unlawful agency action.” In contrast to these “abstract” harms, the Court found that the Plaintiff States articulated more concrete harm should the preliminary injunction be lifted, in the form of loss of employees or federal contracts, as well as other administrative compliance costs.

As to the dissent, Circuit Judge James E. Graves, Jr. contended that the federal contractor mandate is within the scope of the President’s broad authority to issue orders to “improve the economy and efficiency of contractors’ operations” pursuant to the Procurement Act. Judge Graves rejected the majority’s reasoning that the federal contractor mandate is impermissible because it seeks to govern the conduct of employees, rather than employers. Further, Judge Graves argued that the major questions doctrine does not apply to the federal contractor mandate because the mandate: (i) delegates power to the President rather than an unelected agency; and (ii) is an exercise of the government’s proprietary authority, and is not an unlawful “‘enormous and transformative expansion in’ regulatory authority.”

We will continue to report on developments to the federal contractor mandate here.

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