

Kentucky Federal Court Blocks Federal Contractor COVID-19 Vaccine Mandate in Certain States

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At the outset of a 29-page opinion, District Judge Gregory F. Van Tatenhove made clear what his opinion addressed (and did not address): “This is not a case about whether vaccines are effective. They are. Nor is this a case about whether government, at some level, and in some circumstances, can require citizens to obtain vaccines. It can. The question presented here is narrow. 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?”

The Court’s answer: “[i]n all likelihood, the answer to that question is no.” Before reaching this conclusion, the Court addressed the government’s challenge that the States suing to block the mandate—that is, Kentucky, Ohio and Tennessee—lacked standing to do so. Emphasizing that the federal contracting industry involves many billions of dollars, the Court found the States could properly bring the case to protect public or governmental interests that concern the state as a whole, such as those of state agencies that held federal contracts.

The Court then turned to the two main arguments being advanced by the State: (1) the president exceeded his statutory and constitutional authority in issuing the vaccine mandate; and (2) the agencies at issue did not follow proper administrative procedure in issuing the new rule.

On a general level, these are similar arguments advanced in challenges in other cases to other vaccine mandate rules recently issued by the federal government ([learn more here](#) and [here](#)).

However, they are not identical as the legal frameworks around these varying rules differ. Yet, despite any such differences in the legal frameworks, the outcome of these disputes have—by and large—been ultimately similar: the vaccine mandate rules are often being preliminarily blocked.

In this case, the Court primarily took issue with the lack of a “close nexus” between the purpose of the procurement statute (upon which the President relied for his authority to issue the rule) and the vaccine mandate itself: “it strains credulity that Congress intended the [federal procurement statute] to be the basis for promulgating a public health measure such as mandatory vaccination.”

But the Court’s concerns did not end there. It also scrutinized the rule for:

1. Running afoul of the Competition in Contracting Act in that it did not provide “full and open competition” to all bidders on federal contractor jobs (*i.e.*, unvaccinated bidders);
2. Impermissibly delegating authority to effectively issue public health regulations to agencies designed to promote an economical and efficient procurement system; and
3. Intrusion into regulation of health and safety matters, an area traditionally reserved to States per the Tenth Amendment.

Notably, however, the Court did not accept all arguments advanced by the States. The Court noted in passing, but did not conclude, that a vaccine mandate may “be more appropriate in the context of an emergency standard promulgated by OSHA.” It also rejected the States’ arguments both that the rule did not follow proper administrative procedure and was “arbitrary and capricious.”

Nonetheless, the Court concluded “the enforcement of the [federal contractor vaccine mandate rule] must be paused” while appellate courts unpack the issues and arguments raised by the parties. Note, however, that the Court clarified this injunction only applies to Kentucky, Ohio, and Tennessee.

As always, do not hesitate to reach out to a member of Labor & Employment Team at Sandberg Phoenix with your current questions and concerns and stay tuned for further developments.