

EMPLOYER LAW BLOG

# VACCINE MANDATE UPDATE: Louisiana Court Partially Blocks Federal Contractor Rule in Three States

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In a slight departure from prior decisions on the mandate, this order involved some new and interesting nuance, as it only blocks enforcement of the vaccine mandate in contracts between these three states and the federal government—not in contracts between private companies and the federal government.

This is unique, but not necessarily unexpected, as the applicable statute for the federal contractor vaccine mandate is the Federal Property and Administrative Services Act (“FPASA”)—a law that, at its heart, governs contracts themselves (as opposed to workplaces or facilities, like the other federal vaccine mandates).

Nonetheless, this still leaves open the question: why did the Court limit its injunction so that it does not apply to contracts between the government and private companies (like the injunctions issued by federal courts in Georgia and Kentucky do)?

The Court explained its rationale: “there is not a single plaintiff representative of private contractors nor has there been any presentation of evidence of [President Biden’s Executive Order’s] effect on private contractors for this court to enjoin the national government from enforcing [the Executive Order] on private contractors.” The Court also added “this distinction is presently not considered because of the national injunction imposed against [the Executive Order] by Judge Baker in” in the Georgia case. So this limitation largely seems to result from who the parties before the Court were.

The Court moved onto the merits after this distinction. In rejecting the mandate, the Court emphasized “bizarre coverage differences” between the Executive Order for the federal contractor vaccine mandate and the guidance issued by the Federal Acquisition Regulatory Council (“FAR Council”) on it. In particular, the Court noted the Executive Order stated it did not apply to grants, but the guidance left this question open by omitting any similar or clear exclusion from what the guidance otherwise characterized as its “broad” coverage.

Applied to this case, the Court found this problematic because challengers to the mandate presented evidence at a hearing before the Court that the National Institute of Health had “pushed” the University of Louisiana at Lafayette (“ULL”) to comply with the mandate per the FAR Council guidance, causing ULL uncertainty and fear about the prospect of losing grant funding.

The Court also heard evidence from a ULL employee who testified her employment was threatened if she did not comply with the vaccine mandate, even if she had a valid religious exemption and even if she complied with prior masking and testing requirements set before the Executive Order.

Against this backdrop, the Court addressed the parties’ arguments on the merits. After rejecting challenges to both standing and jurisdiction, the Court ultimately concluded that the Executive Order conflicted with the Tenth Amendment by encroaching upon powers reserved to States—namely, regulation of public health and safety.

The Court also concluded that the FAR Council guidance—which it found to constitute reviewable “agency action”—was invalid because federal agencies “circumvented” administrative rulemaking protections, such as a sufficient notice and comment period, in rolling out the mandate.

But before it reached these conclusions, the Court did observe that—even though “[t]he FPASA is a procurement statute, plain and simple”—its purpose to facilitate an “economical and efficient system” is “not narrow.” In this regard, it noted that “an obligation imposing a secondary policy will survive attacks so long as there is close nexus between the obligation and the Government’s primary policy under FPASA to procure and manage properties and services in an economical and efficient manner.”

Here, the Court actually agreed with the government that there was “a reasonably sufficient nexus...between [President Biden’s Executive Order] and the government’s policy under FPASA to procure and manage properties and services in an economical and efficient manner.” Specifically, the Court found: “[i]t is not unreasonable to assume that a vaccinated labor pool will be more reliable during surges of viral transmission than an unvaccinated labor pool.”

But, this finding did not save the mandate, because, as noted above, the Court found that the mandate could not pass constitutional muster under the Tenth Amendment. So, while the Court acknowledged prior cases that similarly found a “reasonably sufficient nexus” between a government secondary policy and the purpose of the FPASA (and the Court found such a nexus in this case, too), the Court distinguished these cases on the basis that those cases did not involve policies with a constitutional deficiency like the one in this case.

At the end of the day, it will be interesting to see whether and how the Sixth Circuit and Eleventh Circuit will address similar issues and arguments in the appellate proceedings stemming from the injunctions entered by the Kentucky and Georgia District Courts. We would also expect an appeal to be filed on this decision in the Fifth Circuit. So, be sure to check back for more updates.