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# Kentucky Court Blocks Federal Contractor Vaccine Mandate

On November 30, 2021, the United States District Court for the Eastern District of Kentucky, in *Kentucky v. Biden, et al.*, No. 3:21-cv-00055, granted a preliminary injunction limiting the enforcement of the federal vaccine mandate for some federal contractors and subcontractors. The preliminary injunction was requested by the Commonwealth of Kentucky, the State of Ohio, and the State of Tennessee. As a result, the court enjoined the federal government “from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee” pending further briefing and a full resolution of the case on its merits.

## The court’s rationale

The court based its preliminary injunction on its conclusion that President Biden exceeded his statutory authority under the Federal Property and Administrative Services Act (FPASA). FPASA gives the President wide latitude to implement procurement policies that promote “economy and efficiency” in federal contracting; however, the court noted that the President’s statutory authority over procurement does not extend automatically to measures addressing public health.

[I]t strains credulity that Congress intended the FPASA, a procurement statute, to be the basis for promulgating a public health measure such as mandatory vaccination. If a vaccination mandate has a close enough nexus to economy and efficiency in federal procurement, then the statute could be used to enact virtually any measure at the president’s whim under the guise of economy and efficiency.

The court goes on to conclude that the Biden administration’s use of FPASA violated the Competition in Contracting Act (CICA); the nondelegation doctrine, and the Tenth Amendment to the U.S. Constitution.

Despite enjoining the “vaccine mandate” as exceeding FPASA statutory authority, the court expressly rejected the Plaintiffs’ administrative challenges. The court determined that the Biden administration likely followed the appropriate procedural requirements in promulgating the vaccine mandate.

## **What this means for federal contractors and subcontractors**

For federal contractors and subcontractors with no offices, operations, employees, or subcontractors in Kentucky, Ohio, or Tennessee, **nothing has changed**, and they should continue to comply with FAR 52.223-99 (Deviation) and other similar contract clauses and the most current version of the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (“Guidance”).

For federal contractors and subcontractors with offices, operations, employees, or subcontractors physically located in Kentucky, Ohio, or Tennessee, the situation is much more complicated. The court’s preliminary injunction is not particularly clear for the following reasons:

The court enjoined only “the vaccine mandate.” The order does not mention the masking, distancing, or responsible person requirements from the Guidance. Because they were not mentioned, presumably those aspects of the Guidance are not enjoined; however, it is unclear at this time.

The preliminary injunction applies to “all covered contracts in Kentucky, Ohio, and Tennessee.” As worded, it is not clear whether the injunction was intended to cover (1) work performed in those three states (regardless of where contractors have offices); (2) only contractors and/or subcontractors with offices in one or more of those states; (3) contractor and/or subcontractor employees physically located in those three states (either at contractor facilities or teleworking from their personal residences); or (4) some combination of the above.

The preliminary injunction enjoins only “**The Government**” from enforcing the Guidance and FAR 52.223-99. As worded, the preliminary injunction does not prevent prime contractors or other higher-tier subcontractors located in other states or performing work on federal contracts located in other states from flowing down the contract clauses to subcontractors in Kentucky, Ohio, or Tennessee, or otherwise requiring subcontractors to comply with the Guidance and contract clauses.

Unless and until the court clarifies the scope of the preliminary injunction, federal contractors and subcontractors with offices in or performing work on federal contracts in Kentucky, Ohio, or Tennessee should seek legal counsel in order to stay in compliance with any remaining contractual obligations in light of the uncertainties caused by the federal court’s order.

All federal contractors and subcontractors should also consider that the court's order was limited to enjoin the federal government from enforcing at least part of the Biden administration's vaccine Guidance. Nothing in the court's order precludes contractors and subcontractors from implementing their own COVID vaccination requirements that comply with applicable state law.

## **Contact us**

We expect many fast-moving changes in this case and other federal cases across the country challenging the legality of the federal contractor COVID Guidance and contract clauses. We will be updating, as developments warrant.

In the meantime, please contact Michael Schrier, Brian Waagner or your Husch Blackwell attorney.

## **Your comprehensive COVID-19 legal resource**

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.