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GovCon Alert:

What We Know And Don't About The Federal Court Order Enjoining EO 14042

By: The Sheppard Mullin Government Contracts Team*

December 2021

In news that will be of interest to every federal contractor, including large and small businesses, universities, banks, and the health care industry, Executive Order 14042 (along with the related Task Force Guidance and contract clauses) has been ENJOINED in the states of Kentucky, Ohio, and Tennessee. U.S. District Court Judge Gregory F. Van Tatenhove of the Eastern District of Kentucky issued an order on November 30, 2021 granting Plaintiffs' (a group including the states of Tennessee, Kentucky, and Ohio) motion for a preliminary injunction.

The decision most certainly will be appealed. In the meantime, contractors with employees performing in Kentucky, Ohio, or Tennessee are not required to comply with the Executive Order or FAR/DFARS clauses. Obviously, this creates a conundrum for federal contractors and subcontractors looking for a uniform way to implement the EO rules.

Background

Plaintiffs Kentucky, Ohio, and Tennessee filed suit in the U.S. District Court for the Eastern District of Kentucky on November 4, 2021, and four days later filed for a Temporary Restraining Order and Preliminary Injunction ("TRO/PI"). The TRO/PI motion asked the Court to enjoin the Government's enforcement of EO 14042. Plaintiffs challenged the EO on 10 separate grounds, including that it violated the Federal Property and Administrative Services Act ("FPASA"), the Competition in Contracting Act ("CICA"), the Administrative Procedures Act ("APA"), and the U.S. Constitution. The Court held a conference among the parties on November 9 and a hearing on November 18.

The District Court Decision

Regardless of whether one likes the outcome or not, Judge Van Tatenhove's decision is thoughtfully reasoned and well written. It is methodical and well cited. In sum, Judge Van Tatenhove enjoined the EO not because of the process by which the Administration implemented the mandate (i.e. not due to the lack of a meaningful notice-and-comment period or the unprecedented dynamic nature of the FAR clause), but rather because he found the Administration never had the authority to implement a vaccine mandate in the first place. In other words, the Court issued the injunction because the President of the United States purportedly lacks the statutory or constitutional authority to regulate public health via a contract clause issued pursuant to a procurement statute.

The decision, however, readily concedes that the Court's view is the beginning, not the end, of the story. "Once again," the Judge explained, "the Court is asked to wrestle with important constitutional values implicated in the midst of a pandemic that lingers. These questions will not be finally resolved in the shadows. Instead, the consideration will continue with the benefit of full briefing and appellate review. But right now, the enforcement of the contract provisions in this case must be paused."

The Practical Impact (and Scope) of *Kentucky v. Biden*

While the Court's decision is significant, it does NOT apply to all federal contractors. It enjoins the Government "from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee." Sadly, Judge Van Tatenhove does not explain this sentence. Does he mean to enjoin all federal contracts performed in those states, all federal contracts held by contractors operating in those states, or maybe even all federal contracts issued by agencies based in those states? It's unclear. Adding to the confusion is his statement that the injunction "is properly limited to the parties before the Court" (i.e., the states of Kentucky, Tennessee, Ohio). Here again, we are left to guess what he means.

Subsequent to the Court's decision, GSA took prompt steps to notify its contractors of the late breaking news. Here is GSA's take on the scope of the injunction:

> Update: On November 30, 2021, in response to a lawsuit filed in the United States District Court, Eastern District of Kentucky, a preliminary injunction was issued halting the Federal Government from enforcing the vaccine mandate for Federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee.
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> GSA implemented the vaccine mandate stemming from Executive Order 14042 through Class Deviation CD-2021-13. Pursuant to the preliminary injunction, GSA will not take any action to enforce FAR clause 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors in all covered contracts or contract-like instruments being performed, in whole or in part, in Kentucky, Ohio and Tennessee.

While GSA's formulation is a bit more useful than the Court's in that it focuses on contracts "being performed . . . in" the three states, it still does not answer the key question regarding scope.

We think the most common sense interpretation of the scope of the injunction is that it applies to *covered employees performing work in* Kentucky, Tennessee, and Ohio. That being said, GSA's interpretation seems to indicate the analysis should be performed at the contract level, rather than the employee level (i.e., if you have even one employee performing on a contract in one of those three states, then the entire contract is exempt from enforcement).

We hope to receive updated Guidance from the Task Force providing a definitive answer to this question in the near future. Until then, Federal contractors and subcontractors are stuck between the proverbial rock and a hard place – having to decide whether to continue marching ahead pursuant to the EO or navigate different rules in different states.

In reaching their own interpretive decision, contractors should keep in mind that the Court order does not prohibit compliance with the EO, it simply enjoins the Government from enforcing the EO. Before a contractor decides to continue rolling out its existing compliance approach as planned, however, it would be well advised to consider this: *Now that the EO has been enjoined in Kentucky, Ohio, and Tennessee, one can make a credible (and likely correct) argument the EO requirements are no longer mandatory in those states (both vaccination and making/distancing)*. This transition from a mandatory to a voluntary rule creates at least two new hurdles for contractors.

- ***First***, continuing to comply with the FAR/DFARS clauses could create state liability where a state has a law against a vaccine mandate. For example, on November 12, 2021 Tennessee passed TN HB 9077/SB 9014, which prohibits private businesses, governmental entities, schools, and local education agencies from compelling an individual, or from taking adverse action against the individual to compel them, to provide proof of vaccination. Previously, the Executive Order, as a federal law, would have trumped the conflicting state law. Now, however, the unenforceable EO no longer reigns supreme. Accordingly, continuing to impose the EO on a Tennessee workforce creates state risk.

- ***Second***, continuing to comply with the FAR/DFARS clauses in Tennessee, Kentucky, or Ohio could create problems with a company's collective bargaining obligations. When the vaccine requirement was a legal obligation, it probably was not required to be collectively bargained. Now that the requirement is no longer a legal obligation (at least in the three states covered by the Court order), imposing a vaccine mandate on union employees may have to be collectively bargained.

Accordingly, while marching ahead with an existing EO 14042 company-wide compliance plan may make great sense from an efficiency and consistency standpoint, it could create unintended risks in at least three states (and certainly in Tennessee).

What Should Contractors Do Now?

The EO 14042 COVID safety contracting landscape (like COVID itself) is changing every day. We are hopeful the Task Force will issue new Guidance soon to help contractors navigate the new hurdles created by the Kentucky decision. Until then, here are a few thoughts for consideration:

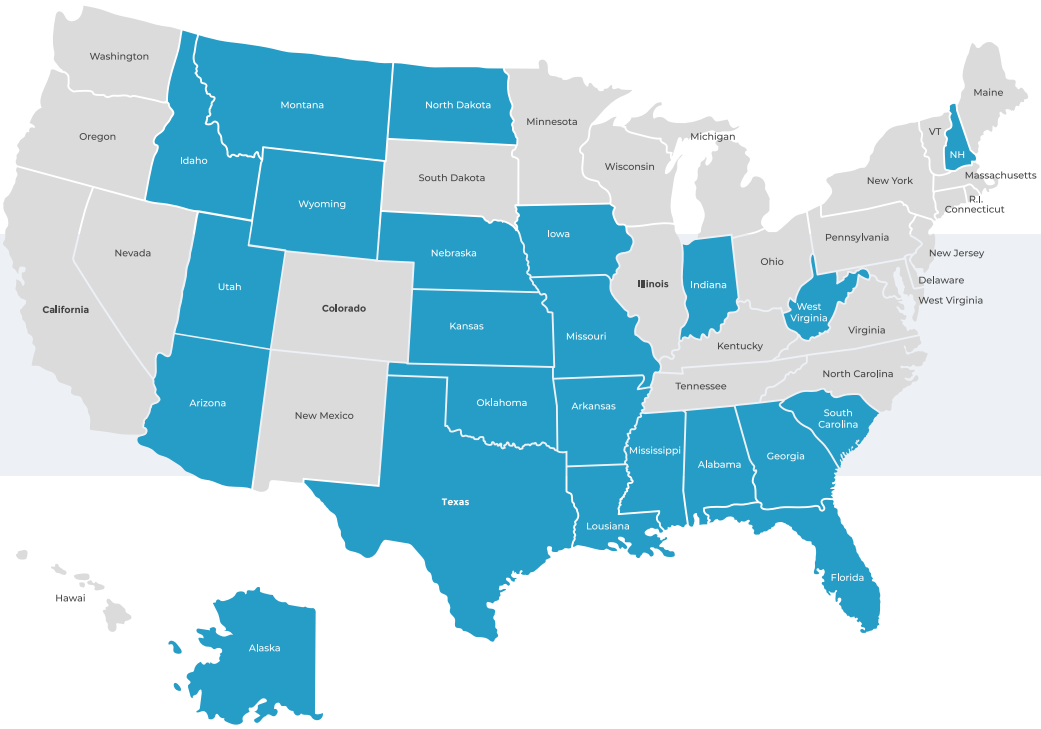
- If you have no employees performing in Kentucky, Ohio, or Tennessee, the Order has no impact on you. The EO still applies to your contracts in other states just as it did prior to the Court's decision.
- If you have employees performing in Tennessee, take a close look at TN HB 9077/SB 9014 before making any decision regarding implementation of the EO.
- If you have employees performing in Kentucky or Ohio and do not have collective bargaining agreements, you may want to continue enforcing the EO to avoid having different rules in different locations. But if you have collective bargaining agreements, make sure you connect with your L&E lawyer before charting a path forward.
- Consider putting together a communication to your employees who no doubt soon will read a headline and have questions about the Order.

- For contractors with employees performing in Kentucky, Tennessee, or Ohio, update your current compliance plan.
- In the absence of further Task Force Guidance, consider staying in close communication with your contracting officer regarding your implementation approach, especially in the three states implicated by the Order.

Additionally, stay on the lookout for additional updates (including from us) on the other pending litigation challenging the EO.

What's Next?

Speaking of the "other pending litigation," the docket still is full of challenges to the EO. By our count, there are motions for preliminary injunction pending in cases with 24 additional states as plaintiffs:



The judges in these cases are not bound by the Kentucky decision – either on the merits or the scope of any resulting injunction. Meaning, should a judge in one of the remaining cases also strike the EO as contrary to law or the Constitution, that judge could choose to issue a nationwide injunction covering all contractors in all states (or, as the Kentucky judge chose, limit the application to the specific state(s) involved). Only time will tell. As of the publication of this Alert, three of those cases have hearings scheduled for December 3, 6, and 7. We expect decisions shortly thereafter.

Importantly, as the Kentucky decision explicitly recognizes, it's unlikely any of these district courts will be the final arbiter of the legality of EO 14042. We think it's only a matter of time until we get the rarely seen, yet always celebrated, Supreme Court government contracts decision. Stay tuned. And keep an eye on the Sheppard Mullin EO 14042 Survival Guide for more information as the story continues to unfold. In the meantime, contractors operating outside Kentucky, Ohio, and Tennessee should keep in mind that Executive Order 14042 (and, thus, the information in the Survival Guide) remains in effect.

For Those Wanting A Bit More Detail . . .

For those interested in the details of the Kentucky decision, here is a brief summary:

After analyzing and concluding that the plaintiffs had standing to pursue this matter on behalf of their agencies *and businesses operating in their states* (a contrary outcome to the U.S. District Court's recent decision in Mississippi), Judge Van Tatenhove jumped right in to analyzing the myriad arguments raised by Plaintiff. Briefly, here is what he found:

- ***FPASA***. Plaintiffs argued that the President exceeded his authority under FPASA in issuing the EO. The Court agreed, reasoning that FPASA was intended to give the President procurement powers, not unlimited powers. "FPASA does not provide authority to 'write a blank check for the President to fill in at his will. . . ." The Court found an insufficiently close nexus between the EO and the need for economy and efficiency in the procurement of goods and services, reasoning that similar logic could authorize a president to outlaw overweight contractor employees since the CDC has concluded that obesity worsens the outcomes of COVID-19. While recognizing the breadth of FPASA and how it historically has been used to promote far reaching social labor policies (e.g., EO 11246), for this judge at least, the COVID-19 mandate was just a bridge too far.

- ***CICA***. CICA requires agencies to provide "full and open competition through the use of competitive procedures" in federal procurements. The Court found that the EO violates CICA. According to Judge Van Tatenhove, "contractors who 'represent the best value to the government' but choose not to follow the vaccine mandate would be precluded from effectively competing for government contracts." It seems to us this reasoning does not hold up under close scrutiny. Couldn't one say the same thing about contractors precluded from contracts where they "choose not to follow" the Trade Agreements Act, Section 889, Executive Order 11246, or any other number of gating procurement rules? In any event, the Court found the argument compelling at least "at this early stage in the litigation."

- ***Non-Delegation Doctrine***. The non-delegation doctrine precludes Congress from transferring its legislative power to another branch. Plaintiffs argued that "mandating vaccination for millions of federal contractors and subcontractors is a decision that should be left to Congress (or, more appropriately, the States) and is a public health regulation as opposed to a measure aimed at providing an economical and efficient procurement system." In evaluating Plaintiffs' argument, the Court looked to the OSHA rule recently struck down by the Fifth Circuit. "It would be reasonable to assume that a vaccine mandate would be more appropriate in the context of an emergency standard promulgated by OSHA," Judge Van Tatenhove noted, and then went on to note that even the OSHA ETS was struck down as a violation of the non-delegation doctrine. If the ETS couldn't withstand a non-delegation challenge, "the Court has serious concerns about the FPASA, which is a procurement statute, being used to promulgate a vaccine mandate for all federal contractors and subcontractors." The Court acknowledged "that only twice in American history, both in 1935, has the Supreme Court found Congressional delegation excessive." Nonetheless, Judge Van Tatenhove seems to believe he has found the third. He mused, however, that "it may be useful for appellate courts to further develop the contours of the non-delegation doctrine, particularly in light of the pandemic."

- ***Tenth Amendment***. As we all will remember from high school civics (if not from law school), the Tenth Amendment states that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Court expressed a "serious concern that Defendants have stepped into an area traditionally reserved to the States," and held the Tenth Amendment provides an additional reason to enjoin the EO.

In short, Judge Van Tatenhove clearly believes the Plaintiffs in this case are likely to prevail on multiple statutory and constitutional bases.

The decision then goes on to discuss whether the President (through his delegated officials) failed to follow applicable administrative procedures in issuing the EO and the subsequent FAR clause. Here, the President fared better than he did with Plaintiffs' constitutional arguments. The Court concluded that the Administration, while perhaps "inartful and a bit clumsy" at times, "likely followed the procedures required by statute." The Court also concluded that the Administration did not act arbitrarily or capriciously (as defined by the APA). "The Court finds, based on the limited record at this stage in the litigation, that Defendants have followed the appropriate procedural requirements in promulgating the vaccine mandate." But this all is little solace to the Administration as it would have been much easier to overcome a procedural error than a constitutional one — let alone the "serious Constitutional concerns" identified by Judge Van Tatenhove.

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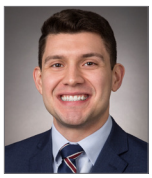

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