

GA District Court's Federal Contractor Vaccine Mandate Injunction Upheld by Eleventh Circuit – Should Federal Contractors Now Worry About ETS?

Related Professionals

Jennifer S. Cluverius
864.282.1169
jcluverius@nexsenpruet.com

Caitlin R. Walker
864.282.1108
CWalker@nexsenpruet.com

Practices

Employment & Labor Law

Article

12.22.2021

On December 7, 2021, the United States District Court for the Southern District of Georgia issued a preliminary nationwide injunction enjoining the enforcement of Executive Order 14042's federal contractor vaccine mandate. The government promptly appealed the order to the United States Court of Appeals for the Eleventh Circuit, and also moved to stay the injunction.

After an expedited briefing process, the Eleventh Circuit denied the government's motion to stay, effectively upholding the injunction. In its order dated December 17, 2021, the Circuit cited the government's failure to demonstrate "that it w[ould] be irreparably injured absent a stay" as its primary basis for the denial. Irreparable harm is one of "the most critical factors" that a court must analyze in determining whether or not to grant a preliminary injunction. The Court did not issue a detailed opinion on the matter, but generally conveyed the fact that the government failed to meet its burden.

Importantly, the Eleventh Circuit did not address the merits of the government's appeal to the injunction. However, the Court expedited the government's appeal, setting the case for the next available oral argument. The government must file its initial brief by January 3, 2022, with response briefs due by January 17, 2022, and replies thereto due by January 24, 2022.

With the federal contractor vaccination mandate currently on hold but working its way through the court system, federal contractors face uncertainty as to whether or not they may be required to comply with OSHA's newly reinstated Emergency Temporary Standard ("ETS"). In the event the ETS is ultimately deemed applicable to federal contractors, they could be required to rework and revise their vaccination policies, make

ETS-required postings, and comply with certain recordkeeping and other requirements. With a looming January 10, 2022 ETS deadline, full compliance by federal contractors, in the event it is required, may prove impossible.

While there is currently no definitive answer to this question, there is a viable argument based on OSHA's stated intent in the ETS that the federal contractor exemption still applies. By way of brief history, OSHA issued two Emergency Temporary Standards. The first applied to healthcare workers. The second, the "OSHA ETS", purports to regulate employers with one hundred or more employees. The OSHA ETS explicitly exempts employers falling under the federal contractor vaccination mandate from coverage under the OSHA ETS. However, no federal agency has released guidance confirming whether this exemption holds in light of the stay on the federal contractor mandate.

Additionally, taking into account that: 1) OSHA and other federal agencies have never expressly stated that the federal contractor exemption contained in OSHA's ETS does not continue to apply in the event the federal contractor mandate is enjoined, and 2) certain guidance provided by the agencies indicates an intent that each mandate should affect only those workers who fall within its own specifically listed criteria, a good argument exists that federal contractors are not now subject to the OSHA ETS. However, employers should watch for any new guidance from federal agencies on this topic, as well as the litigation developments pertaining to any of these mandates given the constant state of flux.