

# What Remains of the COVID-19 Vaccination Mandate, and What Insights Can Federal Contractors Draw From the Experience?

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Ask someone you know about the COVID-19 vaccination requirements for contractors, and you might get an, “Oh yeah, what happened to that?” Issued in early September 2021, Executive Order (EO) 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, prescribed contract terms that would require contractors to follow guidance from the Safer Federal Workforce Task Force, which in turn mandated vaccinations for many contractor and subcontractor employees. Litigation promptly followed, resulting in several injunctions that stalled implementation.

This article answers that question of what has happened to the mandate since then. For more than a year, the contractor vaccine mandate has, functionally, been on the shelf. Although further developments in the appellate courts have arguably opened the door to resuming the mandate’s enforcement, any effort to do so would face practical questions and obstacles. This article then considers what the vaccine mandate’s implementation by the Executive Branch and interpretation by the courts might mean for federal procurement generally. While the pandemic should end at some point, the vaccine mandate could have an extended impact on procurement policy and practices.

## Background on EO 14042

EO 14042 directed the Task Force to publish guidance (originally issued September 2021) for workplace safety standards related to COVID-19. The guidance required, among other things and with limited exceptions, that all covered contractor and subcontractor

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employees be fully vaccinated against COVID-19 by early December 2021, a deadline that would later slip to January 2022. At the end of September 2021, various agencies issued class deviations and implementation instructions. Revisions and updates to the Task Force's guidance followed in the ensuing weeks and months.

### **Injunctions on Enforcement**

In late October 2021, the state of Florida filed the first of many legal challenges to enjoin enforcement of the contractor vaccine mandate. In total, 26 states sued and obtained injunctions preventing enforcement of the mandate. Most were limited to specific geographic areas or to specific parties. But in early December 2021, the Southern District of Georgia issued a nationwide injunction covering all federal government contracts awarded in the United States.

The Government appealed and has thus far lost in all the decisions issued by the time this article went to press (Fifth, Sixth, and Eleventh Circuits). The circuit courts have agreed with the district courts that EO 14042's requirements for vaccinations exceeded the President's authority conferred under the Federal Property and Administrative Services Act of 1949, commonly called the Procurement Act. The courts found that the Government's stated rationale—limiting the spread of COVID-19 would improve performance of federal contracts—was too attenuated a connection to the President's statutory authority to prescribe policies for the federal procurement system.

The Government has succeeded in narrowing these injunctions, though. Most notably, in August 2022, the Eleventh Circuit shrank the Georgia district court's nationwide injunction to apply only to the plaintiffs, several states, and a trade association. The Sixth Circuit issued a similar decision last month limiting the scope of its injunction to apply only to contracts involving the plaintiff states.

### **The Prospects of Resumed Enforcement**

While the narrowed injunctions arguably mean that the Government could proceed with limited enforcement of the contractor vaccine mandate, any re-implementation would invariably lead to issues in trying to administer and enforce the mandate in only certain states and on only certain contracts. In October 2022, after the Eleventh Circuit had narrowed the nationwide injunction, the Task Force released interim guidance reinforcing that agencies should (1) not enforce contract clauses implementing EO 14042, (2) not modify any contracts to insert clauses implementing EO 14042, and (3) not include any clauses implementing EO 14042 in new solicitations. The Task Force advised that it and the Office of Management and Budget (OMB) would provide specific instructions before any resumption of implementing EO 14042.

The Task Force and OMB had not done so as this article went to press. A reasonable question might be what the future holds for the vaccination requirement. One might view it and other requirements as having already served their purpose by prompting many contractor personnel to get vaccinated and follow other safety protocols. Attempting to reactivate the requirements now would face questions about both efficacy (given the current data on the pandemic) and legal viability (given the court decisions).

Plus, the Task Force would have to grapple with all manner of practical questions. As just one example, how would the Task Force guidance's definition of "fully vaccinated" account for the widely varying uptake of boosters and the Government's reported consideration of shifting the COVID vaccine to, as with the flu, a single shot given annually? As another, would contractors (finally) be compensated for their costs in rolling and re-rolling out these programs in their organizations? These questions are important, and the difficulty in answering them may contribute to caution in any potential resumption of enforcement.

### **What These Developments Signal About Procurement Going Forward**

The more interesting question, though, might be what the vaccine mandate signals about the future for *federal contracting*. One could start with the very nature of a contract obligation. The clauses implementing the EO, FAR 52.222-99 and agency-specific variants, were incredibly brief, directing covered contractors to follow requirements published and updated on the Task Force's website. It's not exactly practicable to price and manage compliance with obligations subject to change, with unpredictable scope and frequency, and listed only on a website sitting well outside a contract's four corners. After-the-fact disputes about which requirements on the website applied at various times are no more practicable to manage. But for areas that can involve moving quickly to address rapidly evolving threats, like cybersecurity, contractors might rightly wonder if this refer-to-our-website model might appear in other new and revised contract clauses going forward.

More broadly, the vaccine mandate may come to bear on the strategic decision of whether and how to challenge EO-driven procurement rules. Courts have historically given these EOs deferential treatment in rejecting challenges to them. In the recent instances when courts have not, the challengers have prevailed largely by showing conflicts with other statutes (EO 13673, Fair Pay and Safe Workplaces) or the Constitution (EO 13673 as well as EO 13950, which addressed diversity training). But now, in the past year-plus, several courts have found that EO 14042's vaccination requirements fall outside the President's authority under the Procurement Act. That shift is subtle but important.

Whether one agrees or disagrees with the recent decisions' treatment of the Procurement Act, the decisions' reasoning will likely factor into any future challenge of procurement-related EOs. Indeed, it's already happening in challenges to the EO 14026 contractor minimum wage in Arizona (challenge rejected), Texas (challenge pending), and the Tenth Circuit (appeal of rejected challenge pending). For other future EO-based rules, potential litigants might be more inclined to pursue challenges, and courts might be more inclined to agree with them, if the question involves defining the scope of Presidential authority under the Procurement Act rather than showing an EO creates a conflict with another statute or other source of authority.

Another important question follows, though: if successful, what will future challengers win? The contractor vaccination litigation portends a shift here, too. The Kentucky District Court enjoined enforcement in three states, which the Sixth Circuit narrowed to contracts with the states themselves; the Eleventh Circuit pared the nationwide injunction back to the challenging states and industry association; and the Fifth Circuit affirmed the Louisiana District Court's injunction, which applied only to contracts between the plaintiff states and the

Government. These patchwork injunctions are thus much narrower than the nationwide injunctions that had previously come to seem almost standard in challenges to federal procurement rules.

Two possibilities follow. One is that more contractors and organizations might feel impelled to pursue EO challenges so that they will be considered plaintiffs covered by less-than-nationwide injunctions. The other is that these types of injunctions leave agencies regularly conducting procurements in which different rules apply to competitors who are and are not within the scope of a jurisdictionally-limited injunction.

These possibilities might prompt readers to think back a quarter century to the Administrative Dispute Resolution Act of 1996, or ADRA. That act consolidated (court) jurisdiction over bid protests in the Court of Federal Claims (COFC), and ultimately divested jurisdiction from the district courts around the country. The purpose was to improve procurement law's uniformity and predictability. Those same values of uniformity and predictability presumably apply to deciding which court(s) will decide which rules apply to competitors in a given procurement. So looking ahead, if challenges to EO-driven procurement rules start to result in mix-and-match injunctions with any regularity, perhaps Congress might take steps to consolidate jurisdiction for those types of challenges at the COFC (which would also require granting the COFC broader authority to grant injunctive relief), or some other single forum.

That type of legislative action would be dramatic. But it seems ever so slightly more likely than we would have thought just a few years ago. In that way, EO 14042 shows that federal procurement rules may be just like any other aspect of contractors' operations: altered by the pandemic and subject to further change in the years to come.

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