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ALERT

Court Partially Lifts Nationwide Injunction of EO 14042 Contractor Vaccination Requirements. Now What?

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WHAT: The U.S. Court of Appeals for the Eleventh Circuit affirmed, but narrowed, a nationwide injunction issued in December 2021 against the enforcement of COVID-19 vaccination requirements for federal contractors' employees under Executive Order (EO) 14042. The court's decision agreed with the ruling from the lower court, the Southern District of Georgia, that the plaintiffs were likely to prevail in arguing that EO 14042's vaccination requirements exceeded the President's authority under the Federal Property and Administrative Services Act of 1949 (aka the Procurement Act).

The Eleventh Circuit found the nationwide injunction overbroad. The court accordingly limited its affirmance to the injunction as applied to the seven plaintiff states (Alabama, Georgia, Idaho, Kansas, South Carolina, Utah, and West Virginia) plus members of the plaintiff Associated Builders and Contractors trade association, "and to the extent that it bars the federal government from considering a bidder's compliance with the mandate when deciding whether to grant a contract to a plaintiff or to a nonparty bidder."

WHEN: The court issued *Georgia v. President of the United States* on Friday, August 26, 2022.

WHAT DOES THIS MEAN FOR INDUSTRY: This is a great question. Many federal contractors will still be covered by one of the other EO 14042-related injunctions issued by other district courts applicable in many other states. For other contractors, more analysis may be warranted. Ordinarily, when a court lifts or narrows an injunction of a procurement rule, contractors within the scope of the rule's coverage

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anticipate needing to start (or restart) compliance promptly.

But contractors might consider a wait-and-see approach here. The pandemic environment that prompted EO 14042 has subsided relative to last fall. There is at least some chance the Government might leave the EO in its current state of nonenforcement and focus its resources elsewhere. And even if the Government is inclined to resume enforcement for regions and contractors not covered by one of the various injunctions, experience suggests that the Safer Federal Workforce Task Force will publish additional guidance and afford contractors a reasonable lead time to resume compliance. So look for updates in the coming days or weeks on the Task Force's webpage specific to federal contractors.

Contractors should give additional attention to the *Georgia v. President* decision's handling of the injunction. All three judges on the panel agreed on narrowing the injunction's scope. In so doing, the court's decision cited other judges and commentators who have criticized what they view as district courts' overuse of injunctions that apply nationwide. The decision here explained the concern as a mix of principled (injunctions should be no broader than necessary) and practical (nationwide injunctions can discourage other courts from adding their own, and some cases differing, interpretations on complex issues).

Federal contractors might view the EO 14042 injunction's narrowing as a reason to update their calculus for when and how to challenge procurement rules through litigation. Nationwide injunctions of such rules have been not uncommon in recent years, such as one based on the likely unconstitutionality of EO 13950's limits on diversity training and one based on finding that much of EO 13673's Fair Pay and Safe Workplaces regime was beset by problems. To the extent this Eleventh Circuit decision furthers a trend towards narrower injunctions, contractors that might challenge future procurement rules should factor in the likelihood that any relief through litigation might be limited to the actual contractor plaintiffs and members of any association-type plaintiffs. Contractors with geographically dispersed operations should also anticipate at least some increase in the possibility of being subject to varying and potentially inconsistent rulings on procurement rules in the future – a rule enjoined in one district court but affirmed by a district court in another circuit – along with the difficulties in deciding what it means to comply with a rule enjoined in some places but not others.

A second long-term question concerns the President's authority to direct procurement rules under the Procurement Act, whether through executive orders or otherwise. District and circuit courts alike have historically afforded the President generous boundaries when ruling on challenges to procurement-related executive orders. This Eleventh Circuit decision makes a text-heavy argument for moving the boundaries inward, however, which other courts facing future challenges might consider and may in some cases find persuasive.

Other circuits might issue decisions keeping the Procurement Act's boundaries at their historical breadth or instead make them even narrower; indeed, fostering that type of variability across district and circuit courts is what motivated the Eleventh Circuit's narrowing of the nationwide injunction here. Moreover, with the unusual lineup of *Georgia v. President* panel – one judge dissented and one only concurred "in the result" – one could see the Government arguing in the future that this decision has limited or no precedential effect when it comes to applying the Procurement Act even within the Eleventh Circuit. But in any event, the *Georgia v.*

President decision sets out a framework heavy in statutory text that may well appear in future litigation seeking to limit the President's authority under the Procurement Act.

Wiley will continue to monitor both the Task Force and any updated guidance on the potential broader implications of the ruling.