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Judge Blocks Biden's Contractor Vax Mandate In 3 States



By [Daniel Wilson](#) · [Listen to article](#)

Law360 (November 30, 2021, 3:34 PM EST) -- A Kentucky federal judge on Tuesday blocked the COVID-19 vaccine mandate for federal contractors from going into effect in Kentucky, Ohio and Tennessee, ruling that the requirement likely exceeded President Joe Biden's authority over federal procurement.

U.S. District Judge Gregory F. Van Tatenhove granted a preliminary injunction preventing the mandate from being enforced against federal contractors and subcontractors in the three states, which had collectively challenged the rule. The mandate requires effectively all employees of federal contractors **to be vaccinated** by Jan. 4, 2022.



The judge said that although the government can in some circumstances require vaccination, President Joe Biden could not do so by exercising presidential authority over federal procurement. (AP Photo/Evan Vucci)

Judge Van Tatenhove said that vaccines are effective and that the government "at some level and in some circumstances" can require people to be vaccinated, but not through the president's authority over federal procurement, which is broad but "not absolute."

"The question presented here is narrow," the judge said. "Can the president use congressionally delegated authority to manage the federal procurement of goods and services to impose vaccines on the employees of federal contractors and subcontractors? In all likelihood, the answer to that question is no."

The underlying September [executive order](#) is being implemented through contractual clauses in new contracts and [ostensibly voluntary](#) modifications to existing contracts.

There are several ways in which Biden likely exceeded his authority with the mandate, and acting for a good cause does not excuse that overreach, according to Judge Van Tatenhove. He rejected arguments that the states, [part of a group](#) of more than 20 states that have challenged the mandate across six separate lawsuits, did not have legal standing for their suit.

Although the Sixth Circuit has never addressed the exact scope of the Federal Property and Administrative Services Act, or FPASA, under which Congress broadly delegated the authority to manage federal procurement to the president, other courts that addressed the issue have found there has to be a "close nexus" between a president's actions and promoting the goals of "economy and efficiency" in federal contracting, the judge said.

The government argued that nexus was "self-evident," in that limiting the spread of COVID-19 will decrease contractor employee absences and labor costs and improve efficiency at work sites. But Judge Van Tatenhove said it "strains credulity" that Congress would have intended FPASA, as a procurement statute, to be used as the basis for a public health measure.

"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 judge said.

The states had also sufficiently argued that the mandate would limit full and open competition by precluding certain companies that would otherwise present the best value to the government on specific procurements from competing for those deals, in violation of the Competition in Contracting Act, according to the judge.

There are also questions about whether the mandate violates the constitutional nondelegation doctrine, Judge Van Tatenhove said. He noted, however, that there is "scarce" precedent on the doctrine, suggesting the issue could use more guidance from appellate courts, "particularly in light of the pandemic" and other similar requirements, such as the [Occupational Safety and Health Administration's vaccination mandate](#) for large private employers.

And the contractor mandate may intrude on authorities reserved for states under the Tenth Amendment, Judge Van Tatenhove said, pointing to the Fifth Circuit's [recent ruling](#) freezing OSHA's rule, which stated that a vaccination mandate regulates "noneconomic inactivity that falls squarely within the States' police power."

But the judge declined to issue a nationwide injunction while the case plays out, finding that the proper scope of the injunction was limited to the three states that brought the suit.

Representatives for the White House and the attorneys general of the three states did not immediately respond to requests for comment Tuesday.

The federal government is represented by Brian M. Boynton, Brad P. Rosenberg, Zachary A. Avallone and Jody D. Lowenstein of the [U.S. Department of Justice's](#) Civil Division.

Kentucky is represented by state Attorney General Daniel Cameron and Barry L. Dunn, Christopher L. Thacker, Heather L. Becker, Jeremy L. Sylvester and Alexander Y. Magera of the attorney general's office.

Ohio is represented by state Attorney General Dave Yost and Benjamin M. Flowers, Carol O'Brien and May Davis of the attorney general's office.

Tennessee is represented by state Attorney General and Reporter Herbert H. Slatery III and Dianna Baker Shew and Brandon J. Smith of his office.

The case is [Commonwealth of Kentucky et al. v. Biden et al.](#), case number [3:21-cv-00055](#), in the [U.S. District Court for the Eastern District of Kentucky](#).

--Editing by Alyssa Miller and Jill Coffey.

Update: This story has been updated to include additional information on the decision.

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Daniel Wilson

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Case Information

Case Title

[Commonwealth of Kentucky et al v. Biden et al](#)

Case Number

3:21-cv-00055

Court

Kentucky Eastern

Nature of Suit

Other Statutes: Administrative Procedures Act/Review or Appeal of Agency Decision

Judge

[Gregory F. VanTatenhove](#)

Date Filed

November 04, 2021

Government Agencies

- [Commonwealth of Kentucky](#)
- [Occupational Safety and Health Administration](#)
- [U.S. Department of Justice](#)
- [U.S. District Court for the Eastern District of Kentucky](#)

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