



## **2021: Year Two of COVID-19 and its Effects on Employment Law**

Andrews Myers has put out over a dozen Employment Updates this year, not to mention the articles in our monthly newsletters. We have had to provide frequent updates to deal with the ever-changing pandemic and a new administration in 2021. We have compiled and revised a few of our updates from the year, in the hopes of explaining where everything stands as of today. We will keep you posted during 2022, as things continue to change.

### **Vaccine Mandates**

#### ***Federal Contractors***

In September, President Biden issued an Executive Order requiring a federal agency to issue guidance that most federal contractors require their employees to be vaccinated against COVID-19 unless they provide a religious or medical exemption.

On December 7, a Georgia federal judge issued a nationwide injunction [blocking the COVID-19 vaccine mandate for federal contractors](#) from going into effect, ruling the Biden administration had likely exceeded its procurement authority. Although the COVID-19 pandemic has wrought a "tragic toll," the government cannot act outside its lawful authority even "in pursuit of desirable ends," U.S. District Judge R. Stan Baker ruled in the State of Georgia et al. v. Biden et al., case number 1:21-cv-00163, in the U.S. District Court for the Southern District of Georgia.

"In this case, plaintiffs will likely succeed in their claim that the president exceeded the authorization given to him by Congress through the Federal Property and Administrative Services Act when issuing Executive Order 14042," which implemented the mandate, Judge Baker said.

Industry group Associated Builders and Contractors Inc. had intervened in the suit originally brought by Georgia and six other states, and Judge Baker said the group, with members located across the U.S., had sufficiently supported its request to block the mandate as the lawsuit marches on.

"Given the breadth of ABC's membership, the number of contracts plaintiffs will be involved with, and the fact that EO 14042 applies to subcontractors and others, limiting the relief to only those before the court would prove unwieldy and would only cause more confusion," he said.

#### ***Governor Abbott***

On October 11, Texas Governor Greg Abbott issued an Executive Order banning all state entities, [including private employers](#), from mandating the COVID-19 vaccine. Specifically, the

Executive Order provides that no Texas employer can compel receipt of a COVID-19 vaccine by any individual, including an employee or a consumer, who objects to such vaccination for: (1) any reason of personal conscience; (2) based on a religious belief; or (3) for medical reasons, including prior recovery from COVID-19. The Texas Executive Order provides for a maximum \$1,000 criminal fine for failure to comply but provides that confinement in jail is not an available penalty. There is not, however, a clear indication of when a violation of this Executive Order would occur or how the \$1,000 fine would be calculated (per employee? per day? per challenge?). Nor is a clear enforcement mechanism for this Executive Order as it does not create a private right of action for Texas employees affected by an employer vaccine mandate. Further, neither the Governor nor the Texas Attorney General have the power to enforce this Executive Order.

As such, the practical relevancy of this Executive Order is questionable. While the Texas Work Force Commission ("TWC") recently sent a letter to all Texas employers echoing the provisions of this Executive Order, the TWC does not have the power to create a private right of action for terminated employees. It appears likely, however, that any employee terminated for failure to comply with an employer vaccine mandate will be entitled to unemployment.

### **OSHA**

OSHA issued an Emergency Temporary Standard ("ETS") in early November 2021 requiring companies with more than 100 employees to require that their employees be vaccinated against COVID-19 or submit to a weekly testing schedule. As expected, a flood of litigation commenced, resulting in an order from the Fifth Circuit (the federal circuit court that includes Texas) staying the further implementation of this OSHA ETS.

All litigation concerning the ETS was subsequently moved to the Sixth Circuit. On November 23, OSHA requested the Sixth Circuit to lift the Fifth Circuit's stay. Late Friday, December 17, a Sixth Circuit panel lifted the Fifth Circuit's nationwide stay, which had prevented the OSHA COVID-19 Vaccinate or Test Mandate for large employers (100+) from going into effect. The Sixth Circuit's opinion overrules the previous decision of the Fifth Circuit.

This means that, at least for now, all employers with 100 or more employees will need to start complying with OSHA's vaccine or test mandate by January 10, 2022. For more on their statement, [click here](#).

OSHA's guidance, through its general duty clause, for complying with recommendations on mask wearing in the workplace has been consistent throughout 2021— follow the guidance from the Centers for Disease Control ("CDC"). The problem has been that the guidance from the CDC has changed with some frequency. The CDC's current recommendations are that people over two years old who have not been fully vaccinated should: (1) wear a mask in indoor public places; and (2) wear a mask in outdoor crowded settings in areas with high numbers of COVID-19 cases. The CDC further recommends that people who are fully vaccinated continue to wear a mask indoors in public if the person is in an area of substantial or high transmission. The CDC still identifies Harris County as an area of "substantial" COVID-19 transmission. You can find the most recent updated information on mask specifics [here](#).

## **OSHA Safety Standards**

The [Top 10 most frequently cited](#) workplace safety standards for FY 2021 are:

1. Fall Protection in Construction (1926.501): 5,295 violations
2. Respiratory Protection (1910.134): 2,527
3. Ladders (1926.1053): 2,026
4. Scaffolding (1926.451): 1,948
5. Hazard Communication (1910.1200): 1,947
6. Lockout/Tagout (1910.147): 1,698
7. Fall Protection in General Industry (1926.503): 1,666
8. Personal Protective Equipment – Eye and Face Protection (1926.102): 1,452
9. Powered Industrial Trucks (1910.178): 1,420
10. Machine Guarding (1910.212): 1,113

## **Other Developments**

The [Protecting the Right to Organize \(“PRO Act”\)](#) which had sweeping pro-labor changes to the law passed the House has stalled in the Senate as expected. Some pro-labor components though, including provisions effectively prohibiting class action waivers in employment disputes have found their way into the pending Build Back Better Act. Given the Biden Administration’s pro-labor stance, we expect measures to continue to be introduced legislatively or through agency action to promote that agenda.

Also, Biden’s executive order directing the Federal Trade Commission to [consider prohibitions on non-compete agreements](#), particularly those limiting mobility of lower-level employees, has seen no action. The use of non-competes has traditionally been the province of state law, and regulating it at a federal level would expectedly be tricky business. The FTC still take some action in the near future to at least limit the use of non-competes.

Lastly, the Fifth Circuit Court of Appeals decided a significant overtime case under the [Fair Labor Standards Act for a highly compensated employee](#), emphasizing that it will apply the strict wording of the overtime laws, rather than the general equities of whether someone *should* be entitled to overtime pay. Their holding in favor of the highly compensated worker, paid on a day rate basis, has led to a fair number of claims filed by similarly classified individuals. The lesson is to consult counsel, audit your classifications and ensure strict adherence to the regulations.

**For more information, please contact [Tony Stergio](#), [Chuck Jeremiah](#) or [Elaine Howard](#).**