



# The Masonry Update

what's happening in the masonry industry in New Jersey

## COVID-19 VACCINE MANDATES LEGAL CHALLENGE UPDATE - DECEMBER 10, 2021

### Federal Contractor Vaccine Mandate

On December 7, 2021, a federal Judge in Georgia issued a nationwide injunction prohibiting the federal government from imposing the contractor vaccine mandate requirement in federal contracts. The lawsuit was brought by the states of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia, the governors of several of those states, and various state agencies and universities.

By way of background, on September 9, 2021, President Biden signed Executive Order 14042 ("EO 14042") which mandated that federal agencies were to add a requirement that contractors and subcontractors provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract into any new contract, or option, extension or renewal of an existing contract. The EO also mandated that the Safer Federal Workforce Task Force provide, by September 24, 2021, guidance regarding adequate COVID-19 safeguards, which must be complied with by federal contractors and subcontractors. On September 24, the Task Force issued its Guidance for Federal Contractors and Subcontractors (the "Task Force Guidance") which requires employees of all federal contractors and subcontractors to be fully vaccinated by January 18, 2022 (originally, December 8, 2021) unless they are excluded or legally entitled to an accommodation. This requirement, unlike the OSHA ETS for Healthcare and the OSHA ETS for Employers with more than 100 Employees, does not allow an unvaccinated employee to do weekly testing in lieu of vaccination.

Among other things, the Plaintiffs in the case testified to having a number of employees who have not yet provided proof they are vaccinated or are in the process of becoming vaccinated. The Plaintiffs argued that many employees will ultimately decline to be vaccinated. Thus, the contractors will ultimately be non-compliant or be forced to terminate valuable employees in order to be compliant.

In its decision, the Court questioned the authority of the President to issue this Executive Order under the Procurement Act. While the Court stated that it was aware of cases where courts have held that a variety of types of executive orders were authorized under the Procurement Act, none have involved measures aimed at public health and none have involved the level of burdens implicated by EO 14042. Moreover, the direct impact of EO 14042 goes far beyond the administration and management of procurement and contracting. In its practical application it requires a significant number of individuals across the country working in a broad range of positions and in numerous different industries to be vaccinated or face a serious risk of losing their job, and operates as a public health regulation.

The Biden Administration is expected to appeal this decision.

### OSHA's Emergency Temporary Standard ("ETS") for Employers with over 100 Employees

As previously reported, on November 12, 2021, in the case of BST Holdings, L.L.C. et al v OSHA, No. 21-60845, the U.S. Court of Appeals for the 5th Circuit issued a nationwide stay of the ETS for companies with more than 100 employees pending final judicial review. As there are a number of lawsuits across the country, all of the cases (and appeals) on this OSHA ETS have been consolidated into one action in the US Court of Appeals for the 6<sup>th</sup> Circuit. The parties are currently briefing the issues and a decision is expected in the near future. OSHA has requested that the case be decided *en banc* (by the entire panel of Judges) - not by a 3 Judge panel which is traditional.

### Medicare/Medicaid Vaccine Mandate

On November 5, 2021, the Centers for Medicare and Medicaid Services ("CMS"), under orders from the Biden Administration, issued a rule requiring COVID-19 vaccination of all eligible staff at health care facilities that participate in the Medicare and Medicaid programs including most hospitals, long-term care facilities, nursing homes, medical offices and others. This rule is unlike the OSHA ETS for Healthcare in that it does not allow an unvaccinated employee to do weekly testing in lieu of vaccination. On November 29 and 30, 2021, two separate federal district courts (the Western District of Louisiana and Eastern District of Missouri) issued injunctions blocking enforcement of the vaccine mandate. The Judge in the Eastern District of Missouri issued a nationwide injunction. The Biden Administration has appealed the case to the US Court of Appeals for the 5<sup>th</sup> Circuit.

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