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ALERT

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**WIMBERLY & LAWSON HELPS SECURE ELEVENTH CIRCUIT
AFFIRMATION OF PRELIMINARY INJUNCTION
IN FEDERAL CONTRACTOR VACCINE MANDATE CASE**

After a delay of approximately 10 months the U.S. Court of Appeals for the Eleventh Circuit has slightly narrowed, but affirmed, a preliminary injunction imposed by the District Court against enforcement of President Biden’s Federal contractor vaccine mandate. This is a major victory for our client, Associated Builders and Contractors (ABC), a nationwide trade group that had filed suit to oppose the mandate.

Readers will recall that on September 9, 2021, President Biden issued Executive Order (EO) 14042 purporting to impose a COVID-19 vaccine mandate on all employees of Federal contractors as well as other workers associated with them. This was one of a series of Executive Orders that sought to impose COVID-19 vaccination requirements on various classes of individuals subject to Federal jurisdiction, from Federal employees to health care workers, members of the armed forces, those subject to the Occupational Safety and Health Act (OSHA), and those who bid on and are awarded contracts to provide goods and services to the Federal government. All were challenged in court, and only the health care worker mandate survived judicial scrutiny.

In an opinion authored by Judge Britt Grant published August 26, 2022, the Eleventh Circuit affirmed, but narrowed, the nationwide preliminary injunction imposed in November 2021 by Judge Stanley Baker of the U.S. District Court for the Southern District of Georgia. The District Court had issued the broad injunction because it found that the contractor vaccine mandate in EO 14042 exceeded the President’s authority under the Procurement Act and that the various plaintiffs, which included several States and State entities such as university systems as well as ABC, were likely to prevail on the merits.

The Court of Appeals agreed with the District Court that Congress did not vest the President with authority to impose vaccination requirements when it passed the Procurement Act: “Nothing in the [Procurement] Act contemplates that every executive agency can base every procurement decision on the health of the contracting workforce.” The Procurement Act is all about economy and efficiency – not health. The Court rejected the government’s argument that the Act conferred complete authority upon the President to control contracting as he thinks best as an “upside-down view of the statutory scheme.”

Having affirmed the injunction in principle the Court turned to its scope. While acknowledging that a nationwide injunction may be appropriate in some circumstances, it observed that some conflict among regions is part of our judiciary’s design, as it helps narrow and refine arguments while there are

mechanisms for consolidation for some cases, such as the OSHA vaccine mandate cases that were consolidated in the Sixth Circuit. Finding the District Court's remedy overbroad the Court of Appeals limited its effect to the plaintiffs – the seven States and agencies that sued, and ABC members -- ruling that they need not comply with the vaccine mandate in their capacity as contractors and are not responsible for including the mandate in agreements with subcontractors. The federal government remains free to impose the vaccine mandate on nonparties in bid solicitations where no plaintiff is a bidder.

Judge Edmondson concurred, and Judge Anderson concurred in part and dissented in part, agreeing with the narrowing of the injunction but disagreeing on the scope of Presidential authority, of which he took a broader view.

Larry Stine, Betsy Dorminey, and Kathleen Jennings of the firm wrote the briefs for ABC and are delighted to find their arguments for the most part crowned with approval by the Court of Appeals. Certainly, going forward ABC membership will carry with it the benefit of exemption from the federal contractor vaccine mandate that non-members will be subject to.

Questions? Need more information? Contact Larry Stine at 404-365-0900.

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