

States Seek 11th Circ. Review Of Employer Vaccine Mandate

Law360 (November 5, 2021, 7:04 PM EDT) — Georgia, Florida and Alabama led a petition Friday for the Eleventh Circuit to review the federal government's employer vaccine mandate, arguing it demonstrates the Biden administration's disregard for constitutional rights.

The Southeast states under Eleventh Circuit jurisdiction were joined in the petition by a handful of private employers, all opposed to the Occupational Safety and Health Administration's **emergency temporary standard**, or ETS, on COVID-19 vaccinations.

The standard, which went into effect Friday, requires employers of 100 or more workers to develop, implement and enforce a mandatory coronavirus vaccination policy. Employers must require employees to either get vaccinated or undergo regular COVID-19 testing and wear a face mask at work.

"The ETS exceeds the [U.S. Department of Labor's] statutory authority, fails to comply with the standards for issuing an ETS, and conflicts with the First Amendment and the Religious Freedom Restoration Act," the states and employers said in their petition.

Georgia Gov. Brian Kemp and state Attorney General Chris Carr publicly condemned President Joe Biden and his administration on Friday over the vaccine mandate, saying it vilified Americans for their personal choices. Biden **issued vaccine mandates** in early September, aiming to protect more than 84 million workers from the spread of COVID-19 while on the job.

"This unlawful mandate is yet another example of the Biden administration's complete disregard for the constitutional rights afforded to our state and our citizens," Carr said in a statement Friday. "The federal government has no authority to force health care decisions on Georgia's companies and its employees under the guise of workplace safety."

Kemp said the vaccine mandate is a recipe for economic disaster at a time when inflation is skyrocketing, the supply chain is screeching to a halt, and job creators nationwide are desperately searching for more workers.

About 50% of Georgians are fully vaccinated, compared with almost 60% nationally, according to Johns Hopkins University. About 45% of Alabama's population is fully vaccinated, while about 61% of Florida residents are immunized against COVID-19, the institution reports.

"Biden is pouring gasoline on a fire," Kemp said Friday. "This federal government power grab defies reason, and Attorney General Carr and I will not allow this administration to force hardworking Georgians to choose between their livelihoods and this vaccine."

DOL Solicitor of Labor Seema Nanda told Law360 the government is fully prepared to defend the vaccine mandate in court. She said the department is confident in its legal authority to issue the emergency temporary standard.

"The Occupational Safety and Health Act explicitly gives OSHA the authority to act quickly in an emergency where the agency finds that workers are subjected to a grave danger and a new standard is necessary to protect them," Nanda said Friday. "This ETS preempts any state or local requirements that ban or limit an employer's authority to require vaccination, face covering, or testing."

Florida Gov. Ron DeSantis **hinted Thursday** at the petition, slamming the federal government for unnecessarily burdening citizens in overly bureaucratic and unconstitutional rules.

"We're supposed to be a government of laws, not a government of men," DeSantis said.

Florida Attorney General Ashley Moody filed a suit on Oct. 28 in the Middle District of Florida challenging a previously announced executive order mandating COVID-19 vaccines for federal contractors.

That mandate was also challenged by Georgia and six other states on Oct. 29 in a Georgia federal court case. The Peach State was joined by Alabama, Idaho, Kansas, South Carolina, Utah and West Virginia in an attempt to have the executive order declared unconstitutional and unenforceable.

"Just a few of the consequences of this mandate include pivotal university research projects being put on hold or abandoned, and locally owned construction companies that help serve our military installations around the state being forced to stop work mid-project," Kemp said during a news conference on Wednesday. "These examples literally only scratch the surface, and we will not stand for this outrageous big government power grab."

Georgia employment attorney Edward D. Buckley, the managing partner of Buckley Beal LLP, told Law360 he can't see OSHA's emergency temporary standard being struck down by the Eleventh Circuit. He said it's hard to argue that workers nationwide are not endangered by the virus, when more than 750,000 Americans have died from it.

"I think it is a well-considered document, they certainly took a little bit of time to put it together and there are a couple of instances where employees can make the argument for medical or religious exemption," Buckley said Friday. "For a substantial period of time, workplaces were completely shut down because of this virus and specifically because it endangered people in the workplace."

Florida is represented by Ashley Moody, Henry C. Whitaker, Daniel W. Bell, Evan Ezray, Jason H. Hilborn, James H. Percival, and Natalie P. Christmas of the Florida Attorney General's Office.

Georgia is represented by Christopher M. Carr, Ross W. Bergethon and Drew F. Waldbeser of the Georgia Attorney General's Office.

Alabama is represented by Steve Marshall, Edmund G. LaCour Jr. and Thomas A. Wilson of the Alabama Attorney General's Office.

The private employers are represented by **Josh Belinfante and Javier Pico-Prats of Robbins Alloy Belinfante Littlefield LLC**, David A. Cortman, John J. Bursch, Frank H. Chang and Ryan J. Tucker

of Alliance Defending Freedom, and Halron W. Turner and E. Tatum Turner of Turner Onderdonk Kimbrough Howell Huggins & Bradley PA.

Counsel information for OSHA was not immediately available.

The case is State of Florida et al. v. Occupational Safety and Health Administration, case number 21-13866, in the U.S. Court of Appeals for the Eleventh Circuit.