

TO: Bret S. Wacker
Nicholas Wieczorek

FROM: J. Christopher White

DATE: February 8, 2022

CLIENT: Air Marshal Association

MATTER: 67411-409682

SUBJECT: Analysis of Potential Litigation Relating to Executive Order (“EO”) 14043

You asked that I investigate Air Marshall Association’s (or the Air Marshalls individually) legal options for the in response to actions taken by the Transportation Security Administration (“TSA”) pursuant to Executive Order 14043 (the “EO” or “EO 14043”). I have reviewed a number of cases brought in response to the EO. In my research, I was unable to find any cases where such a challenge succeeded. Challengers typically failed to demonstrate a risk of imminent harm. Here, based on a recent holding in the Southern District of Texas, we will encounter a similar challenge. *Feds for Medical Freedom v. Biden*, 2022 WL 188329 (S.D.Tex., 2022). Because the *Feds*’ Court issued a nationwide injunction blocking the enforcement of EO 14043 (the “Injunction”), FAMs are not currently facing a risk of imminent harm through termination due to vaccination status. This, of course, can change should the injunction be overturn upon appeal.

BACKGROUND

On September 9, 2021, President Biden issued Executive Orders 14042 and 14043 in response to the ongoing COVID-19 pandemic. EO 14042 directed the implementation of COVID-19 vaccine mandates to employees of Federal contractors. EO 14043 required that Federal employees be vaccinated or have valid religious or medical exemptions. In response to both Executive Orders, various lawsuits have been filed across the country, initially seeking injunctive relief prior to trials on the merits. A Georgia federal district court issued a national injunction against enforcement of EO 14042 which is currently being honored by the Federal Government. Other lawsuits have been filed with respect to EO 14043, e.g., *American Federation of Government Employees Local 501 v. Biden*, 2021 WL 6551602 (S.D.Fla., 2021), in the Southern District of Florida, *Donovan v. Vance, No. 4:21-CV-5148-TOR*, 2021 WL 5979250, at *1 (E.D. Wash. Dec. 17, 2021), filed in the Eastern District of Washington State, and *Feds for Medical Freedom*.

In sum, EO 14043 required all Federal Employees to be vaccinated in accordance with Guidance (the “Guidance”) issued by the Safer Federal Workforce Task Force (“Task Force”). According to the Guidance, Federal employees must be fully vaccinated other than in limited

circumstances where the law requires an exception. Specifically, a Federal agency may be required to provide a reasonable accommodation to employees who communicate to the agency that they are not vaccinated against COVID-19 because of a disability, medical condition or because of a sincerely held religious belief, practice, or observance. An agency determines whether an accommodation is required based on any number of considerations, including an employee's responsibilities and the foreseeable effects on the agency's operations.

On December 8, the TSA Administrator approved a policy memorandum recommending that Federal Air Marshalls ("FAMs") who request an accommodation be denied such request "because of the undue hardship such accommodation would place upon" the TSA. The TSA based this conclusion on purported instructions from the US Department of Justice, as well as standards purportedly established by the Religious Freedom Restoration Act ("RFRA") and the Rehabilitation Act. The memorandum does recommend that FAMs with a "temporary" medical condition be granted a delay in receiving a vaccination but other FAMs seeking accommodation for a sincerely held religious belief, practice, or observance or (presumably more permanent) medical condition will be offered the opportunity to request reassignment to another vacant, funded position in the same or lower pay band for which they qualify (presumably elsewhere at TSA but not as FAMs). If there are no such available positions (or if the FAM is unwilling to make the move), the memorandum states the TSA will implement a "non-disciplinary removal." Importantly, the memorandum permits other TSA employees, including airport screeners, to apply for and receive accommodations (if eligible), i.e., there is no hardship to TSA by granting such accommodations.

On January 21, 2022, as mentioned above, the Southern District of Texas issued a nationwide injunction blocking the enforcement of EO 14043. The Biden Administration immediately filed an appeal to the Fifth Circuit Court of Appeals, requesting a stay of the injunction pending resolution of the appeal.

CURRENT POSTURE

Based on the current existence of the injunction, FAM be unlikely to survive a dismissal motion based on standing or ripeness. In order for FAM plaintiffs to establish standing to obtain federal jurisdiction, the plaintiffs must demonstrate: 1) an injury in fact; 2) a causal connection between the injury and the alleged misconduct; and 3) a likelihood that the injury will be redressed by a favorable decision. *Id.* at 7. In order for a plaintiff to prove "an injury in fact," such a claim must be "actual or imminent, not conjectural or hypothetical." *Id.*

TSA's policy memo is based upon EO 14043 and effecting compliance with the vaccine mandate included therein. As enforcement of EO 14043 is presently blocked, the TSA is not permitted to take any adverse action under EO 14043's vaccination mandate. Stated more fully, the enforcement steps for FAMs who are unvaccinated or fail to disclose their vaccination outlined TSA's policy memo status cannot be implemented if and until the Fifth Circuit (or the United States Supreme Court) lifts the injunction.

The Court's ruling in *Feds for Medical Freedom* expresses similar concerns to those presented by the Air Marshalls Association. The Court rejected the Government's assertion that

employees fired under the EO should go to the U.S. Merit Systems Protection Board. The Court viewed the ability to only to seek a remedy after being fired or suspended as inadequate to prevent substantial harm to federal employees. Additionally, the Court asserted that “any harm to the public interest by allowing federal employees to remain unvaccinated must be balanced against the harm sure to come by terminating unvaccinated workers who provide vital services to the nation.”

The Fifth Circuit’s analysis of the Southern District’s reasoning will provide important guidance on whether the FAMs have a legal remedy. We will continue to monitor the appeal at the Fifth Circuit, or any other challenges to the enforceability of EO 14043.

Please let me know if you would like to discuss further.

Best,

A handwritten signature in blue ink, appearing to read "J. White", with a stylized flourish at the end.

J. Chris White
Associate
Government and Regulators Affairs

JW: