

Trump Rebuke Of Injunctions Could Mean Headaches For Biz

By Juan Carlos Rodriguez

Law360 (June 21, 2019, 1:06 PM EDT) -- Businesses have long bemoaned "regulatory patchworks" that require them to meet different environmental standards in different parts of the country, and the Trump administration's position that courts shouldn't be able to impose nationwide injunctions on executive branch rules could take away an important avenue for companies to seek certainty.

Vice President Mike Pence told the audience at a May meeting of the Federalist Society that nationwide injunctions have been used as a form of "obstructionism" by judges who oppose the administration's policies, such as its efforts to restrict entry of people from certain majority-Muslim countries and take away the availability of asylum to border crossers. The administration has said it plans to ask the U.S. Supreme Court to prohibit federal judges from exercising that power, though it hasn't yet publicly announced how it would do so.

Yet businesses generally prefer nationwide regulatory consistency to a playbook that imposes different rules for different jurisdictions they operate in. The gradual rise in nationwide injunctions over the last several decades has given businesses in many industries and environmental advocacy groups access to a powerful mechanism to achieve nationwide certainty through litigation, and those interests are uneasy about what it would mean if environmental regulations couldn't be addressed on a nationwide scale.

Experts say if district judge-issued nationwide injunctions were banned, it could disrupt the way many interstate companies do business. Court observers don't think it's likely nationwide injunctions will be eliminated altogether, but the issue has such immediate and tangible implications across many industries that they're closely watching developments.

"The more variation you have in regulation, the harder it is to run your business, because you need to expend more resources to figure out what's going on in Vermont versus what's going on in Florida," Sidley Austin LLP counsel Jim Wedeking said.

Nationwide injunctions are a powerful tool, but they've rarely been used in environmental cases since Trump was elected. Last year, a South Carolina district judge handed green groups a win and blocked a U.S. Environmental Protection Agency rule that would have postponed the effective date of an Obama-era rule defining the scope of Clean Water Act jurisdiction, known as the "waters of the United States," or WOTUS, rule.

The underlying jurisdictional rule has been challenged and invalidated in several district courts, but none

of those courts have issued a nationwide injunction. Instead, the courts that have enjoined the WOTUS rule have limited the effect to the plaintiff states actually involved in the cases. As a result, 22 states are subject to the rule while 28 are not.

It's not an ideal situation for companies that have projects or operations in multiple jurisdictions because different rules apply across state lines.

As another example, in 2012, the Sixth Circuit ruled that the EPA unreasonably interpreted the Clean Air Act in classifying numerous Summit Petroleum Corp. facilities dispersed across a 43-square-mile area as a single stationary source. The EPA said it would only apply the Sixth Circuit's ruling in that jurisdiction, a decision that was ultimately approved by the D.C. Circuit.

So natural gas exploration and production companies that had shale gas wells in Ohio had to deal with different EPA rules if they also had shale gas wells in Texas.

Patchwork regulation scenarios would become more common if judges were restrained from issuing nationwide injunctions, and would put more of a strain on businesses, Wedeking said.

"It would be much easier and less expensive on them to simply implement the same rules nationwide," he said. "And a lot of companies would take that even if they had to take more stringent regulations."

The WOTUS rule cases highlight the fact that district courts frequently restrain themselves in terms of the remedies they offer, Bernadette Rappold, a shareholder at Greenberg Traurig LLP, said.

"The bottom line is there's an inherent tension in the court," she said. "A rule is supposed to have nationwide application, and yet there's also this idea that courts are only supposed to be deciding the repercussions of the of the case that's right before them."

So, if a federal district court in Texas decides a challenge to the Clean Water Act rule has merit, it must choose whether to enjoin the rule only in the few states that are involved in that case or expand it to other states that aren't part of the litigation.

And if a business happens to operate in jurisdictions with different regulatory schemes — well, that's just the way it is, she said.

Yet as nationwide injunctions became more prevalent, industry also gained a greater understanding of how powerful and complicated those injunctions can be. Businesses and environmental groups make strategic choices about the courts where they choose to challenge regulations they oppose, in what Rappold describes as transparent forum shopping.

"It's not surprising that people who were annoyed with the actions that President Obama took challenged them in predominantly red state jurisdictions," she said. "And similarly, since President Trump took office, many of his actions have been challenged largely in blue states."

It certainly makes sense for parties to look for the most sympathetic court for their challenges, but Amanda Shafer Berman, counsel at Crowell & Moring LLP, cautioned that nationwide injunctions shouldn't be viewed as a partisan tool.

"It's helpful to remember they're a double-edged sword," she said. "In my practice, I've seen them

requested by both environmental groups and industry groups seeking to block different regulations."

There are times when nationwide injunctions are appropriate, said Brielle Green, legislative counsel at Earthjustice. She said sometimes they are necessary to provide full relief to plaintiffs and to ensure uniformity in the interpretation and application of federal law.

"For instance, when a case involves an environmental issue that crosses state lines — such as pollution of the air or water, or tainted food, or defective products — because geographically restricted injunctions would not provide the plaintiff with complete relief," a nationwide injunction could be appropriate, she said.

On the other hand, Green said there is always a risk of conflicting injunctions, because multiple plaintiffs can seek injunctions in multiple districts. Their requests for injunctions might be identical or at loggerheads, and the judges in those cases could rule completely differently.

If the Trump administration makes good on its threat to ask the Supreme Court to ban all nationwide injunctions, Berman said it's unlikely the justices would totally agree to that resolution.

"I think this court will be more willing than prior courts to overturn at least some nationwide injunctions," she said. "But I would be surprised if they were to take an absolutist position that no district court can ever issue a nationwide injunction."

--Editing by Aaron Pelc.