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Texas Governor Mandates "No Mandates" for COVID-19 Vaccination

Governor Abbott's Executive Order

On October 11, 2021, Texas Governor Greg Abbott issued Executive Order GA-40 (the Texas Order) banning COVID-19 vaccine mandates by any entity, including private employers, in Texas. Because the Texas Order was issued while Texas remains in a state of emergency related to the pandemic, the Texas Disaster Act grants it the force and effect of law. The Texas Order states that "no entity in Texas" can compel vaccination for anyone in the state who objects "for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19." "Personal conscience" is undefined, and this ambiguity in the Texas Order makes it unclear whether an individual can object to the COVID-19 vaccine due to reasons other than religion or those medically related.

Violation of the Texas Order may result in a maximum fine of up to \$1,000 per violation, but it is unclear whether this is a fine is on a daily or per violation basis. The Texas Order does not create a private right of action for workers, but employees of private employers could potentially seek judicial intervention to enforce the Texas Order via injunction.

Governor Abbott also sent a message to the State Legislature requesting that it pass a law to the same effect. The Texas Order would not be rescinded until such passage. Governor Abbott states that "[t]he COVID-19 vaccine is safe, effective, and our best defense against the virus, but should remain voluntary and never forced."

News of the Texas Order comes as a substantial reversal of Governor Abbott's previous position in August 2021 allowing private businesses the choice to mandate vaccines for their workforce. It also follows the previous Executive Order which had already banned COVID-19 vaccine mandates by government

agencies, cities, counties, and school districts in Texas. Additionally, the Texas Legislature previously passed into law a ban on “vaccine passports” which prohibits businesses from requiring proof of vaccination from their customers.

Clash with Biden’s Executive Orders as to federal contractors, OSHA and CMS

The Texas Order is a direct response to President Biden’s Executive Orders requiring the COVID-19 vaccination for all federal employees and certain federal contractors by December 8th, and a subsequent plan to mandate that businesses with more than 100 employees require workers to either be vaccinated or show a negative COVID-19 test at least weekly. Many Texas employers have already enacted vaccine mandates for their employees in light of President Biden’s COVID-19 Action Plan (the Federal Order). The question becomes: which order are Texas employers supposed to follow?

Unlike the Texas Order, which explicitly prohibits vaccine mandates, the Federal Order directs various federal agencies to implement the COVID-19 vaccination plan. The U.S. Occupational Safety and Health Administration (OSHA) is directed to develop and implement the forthcoming Emergency Temporary Standard (ETS), which will require all employers with more than 100 employees to ensure its employees who report to a worksite are either vaccinated or tested weekly. OSHA recently announced that a final version of the ETS was sent the White House for consideration, so we may see the ETS released in the coming days or weeks.

Similarly, the Federal Order directs the Centers for Medicare & Medicaid Services (CMS) to promulgate rules to health facilities that participate in the Medicare and Medicaid programs. On September 9, 2021, CMS announced that it planned to develop and issue an Interim Final Rule with Comment Period in October 2021. This rule would extend the emergency regulations mandating vaccines for nursing home employees and to employees of most other health facilities who participate in Medicare and Medicaid. To date, CMS has not posted any additional information. An overview of the expected Interim Rule can be found [here](#). Noncompliance with the expected rule could result in loss of CMS funding.

Recommendations for employers in Texas

The Texas Order has the force of the law, while the Federal Order, at this time, is merely a directive to agencies, at least until CMS and OSHA issue their rules. As such, the Federal Order does not preempt the Texas Order on its own. Instead, individual federal agency rules will likely serve to preempt the Texas Order in the future. Until CMS or OSHA publish their rules, employers should follow the Texas Order, unless they fall under the federal contractor vaccine program rules discussed here. Until then, we recommend that most Texas employers put a halt to mandatory COVID-19 vaccination requirements because there is currently no federal requirement for vaccinating employees. A

substitute approach would be to encourage vaccination and provide testing alternatives, as it would permit Texas employees to remain unvaccinated at their discretion.

Because the vaccine rules for federal workers and federal contractors likely preempt Governor Abbott's Order, employers subject to those rules should continue to comply with federal law to avoid potential consequences associated with not following those rules. It is noteworthy that Southwest Airlines and American Airlines, who are each based in Texas and contract with the federal government, stated that they would move ahead with plans to meet the December 8th deadline regardless of the Texas Order.

It is important to note, however, that the Texas Order only states that employers cannot "compel receipt of a COVID-19 vaccine," and does not explicitly prohibit employers from inquiring into employee's vaccine status or taking adverse action against an employee based on vaccine status. Thus, it arguably leaves the door open for a mandatory vaccine policy that doesn't "compel receipt" of the vaccine because the employee is free to resign from their employment. Additionally, a vaccine mandate with an alternative option for weekly testing, as in the Federal Order, may comply with the Texas Order since it does not necessarily "compel receipt" of a vaccine.

What this means to you

This situation is fluid and guidance will be updated as federal and local government agencies respond. It is very likely that lawsuits will soon be filed challenging the Texas Order. Until a court or agency makes a ruling clarifying the issue, we recommend that Texas employers follow the Texas Order in most situations and stay tuned for further guidance in the upcoming weeks as this unfolds.

Contact us

If you have any questions about this update or how it might affect your business, contact Ellee Cochran, Joe Geraci, Kevin Koronka, Leslie Basque or your Husch Blackwell attorney.

Your comprehensive COVID-19 legal resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.