

FAQ: Texas Executive Order Restricting Mandatory Vaccination Policies

On October 11, 2021, Texas Governor Greg Abbott issued Executive Order No. GA-40 placing restrictions on any entity (including private employers) from issuing COVID-19 vaccine mandates, subject to legislative action. It is effective immediately and is expected to be challenged in the courts. Texas now joins Montana as one of only two states with current executive orders or laws prohibiting a private employer's right to mandate COVID-19 vaccination of employees. This practical summary is intended to help all employers understand the obligations required under this new executive order.

What Does the Executive Order Require?

The executive order prohibits any entity within the state of Texas from compelling "receipt of a COVID-19 vaccine" by "any individual" who objects to vaccination for "any reason of personal conscience, ... religious belief, or for medical reasons[.]" An individual may not be compelled to receive a COVID-19 vaccine if they have an objection based upon (1) personal conscience,¹ (2) religious belief, or (3) medical reasons, including prior recovery from COVID-19.

It is notable that this executive order does **not** outright prohibit all types of mandatory vaccination policies. Nor does the order prohibit differential treatment of unvaccinated employees. For example, many employers have created additional requirements for certain individuals who are unwilling or unable to obtain a vaccine such as weekly COVID-19 testing, in-office mask requirements, and/or mandatory physical distancing, to name a few.

It does, however, create Texas-sized exceptions to any mandatory vaccine policy by requiring exceptions for "any reason of personal conscience" and prior COVID-19 infection. Notably, the order does not define what is a sufficient "medical reason," and does not specify what types of evidence of prior COVID-19 infection can be lawfully required by employers.

Who is Covered by the Executive Order?

The executive order is effective "on a statewide basis" and applies to any "entity in Texas[.]" Thus, the intended scope of the executive order applies to all employers operating within the state of Texas regardless of size, industry, or incorporation. For employers with a national geographic footprint, this executive order would likely not apply to operations outside the state of Texas.

Does the Executive Order Apply Just to Employees?

No. The executive order specifically covers "any individual, including an employee *or a consumer* ..." As a result, any service industry business such as hospitality, restaurants, or grocery stores with public patrons that could be considered a "consumer" likely falls within the intended definition.

What Should Employers Who Have Already Implemented a COVID-19 Vaccine Policy Do?

For employers who have implemented a mandatory vaccination policy, you should make a determination as to whether to modify your policy while this executive order makes its way through the courts. The executive order calls for legislative action codifying these requirements and notes Governor Abbott will "rescind this executive order upon the effective date of such legislation." This is perhaps an indication and acknowledgement of the upcoming legal challenges faced by the executive order until and unless legislative action is taken.



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What is the Penalty for Noncompliance?

For any “failure to comply with” this executive order, the penalty shall be the “maximum fine allowed” under Section 418.173 of the Texas Government Code, which is \$1,000.

What About Employers Who May Be Required To Implement a Mandatory Vaccination Policy Under Conflicting Federal Mandates?

There is a clear conflict — likely by design — between the Biden administration and Governor Abbot on requiring COVID-19 vaccines. The executive order makes a point of noting “the Biden Administration is now bullying many private entities into imposing COVID-19 vaccines mandates ...”

For federal contractors or health care entities who are covered by recent or soon to be established federal vaccine mandates, there is a clear conflict between federal and state requirements that must be addressed by the courts. The anticipated OSHA mandate for employers with more than 100 employees has not yet been issued, so, at this time, it is uncertain whether there will be a conflict between these two mandates.

The executive order does not address the direct conflict with federal law leaving many significant questions for the courts to decide. Until this conflict is resolved by the judicial process, employers and businesses are left to decide what policies and practices are in their best interest to follow, weighing such considerations as operational effectiveness, potential penalties, and safety.

As always, please note that individual facts may differ, and requirements under local, state, or federal laws and collective bargaining agreements might impact the ultimate analysis described above.

¹ The language in the order is not clear as to whether “personal conscience” is a new exception that is separate from a request for an accommodation based on a religious belief. Based on the stated purpose of the order, we presume a new non-religious objection was intended to be included.