

5 EMPLOYER CONSIDERATIONS AS TEXAS GOVERNOR ATTEMPTS TO BAN WORKPLACE VACCINE MANDATES

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Earlier this week, Texas Governor Greg Abbott issued an Executive Order immediately restricting entities in the state – including employers – from compelling any individual to receive a COVID-19 vaccination if that individual “objects for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19.” He also called upon the Texas legislature to address this issue in its current time-limited special session. Although the Order is in some ways consistent with existing federal law, it also appears to widely expand the reasons for which employees may be exempted from vaccine requirements. The language raises numerous questions for employers and also sets up inevitable clashes with federal law, where courts are likely to find that EO-40 is superseded by federal law. Legal challenges, further guidance from the governor, and action by the state legislature may soon provide some clarity. In the meantime, EO-40 makes the road ahead more uncertain for many employers who are attempting to manage the on-going public health crisis and to comply with all applicable laws. What are the five key considerations you should keep in mind as you navigate these turbulent times in Texas?

General Overview

The Texas Executive Order raises immediate questions for companies who are subject to the vaccine mandate issued by [the Safer Federal Workforce Task Force for federal contractors and subcontractors](#). It will also raise questions for employers who will soon be subject to [OSHA's impending](#)

Related People



Jacqueline Del Villar

Associate

[704.778.4176](tel:704.778.4176)



Megan L. Janes

Partner

[954.847.4717](tel:954.847.4717)

Emergency Temporary Standard (ETS), which has been sent to the White House for review and will require companies with 100 or more employees to require all workers to either be vaccinated or tested weekly; participants in Medicare and Medicaid programs, who are awaiting a new vaccine rule from the Centers for Medicare & Medicaid Services (CMS); and potentially among employers who have incorporated vaccine incentives into company wellness plans. The Order does not appear to clash with the OSHA Healthcare Industry ETS that was issued in June because that Standard does not require (or “compel”) vaccinations.

Additional questions loom, such as whether the governor’s Order exceeds his authority – his prior Executive Orders regarding vaccinations and so-called vaccine passports governed only public employers and private companies who were receiving state funds. Additional uncertainties include likely legal challenges to the Order; possible conflicts with federal law; and how and to what extent EO-40 will be enforced. It is also unclear to what extent, if any, the State will actually enforce EO-40, which provides for fines of up to \$1,000 per violation.

Companies with employees in Texas who have already begun requiring vaccinations can take a relatively low risk approach to dealing with the governor’s Order by modifying their policies to provide accommodations to employees who object to being vaccinated on the basis of “personal conscience” (which is not defined in EO-40) and for “prior recovery from COVID-19.” These practices can be modified as new federal rules are issued and/or legal challenges play out. Other options for responding the Order are discussed in more detail below.

Meanwhile, these are the five key considerations arising from the governor’s Order:

1. The Governor’s Authority to Prevent Private Employers from Requiring COVID-19 Vaccinations in Texas is Likely to be Challenged.

Unlike prior Executive Orders in Texas, EO-40 widely broadens its reach by making it applicable to any “entity *in Texas.*” On its face, this language makes EO-40 applicable to any employer or business with a presence *in* or doing business *in* Texas. The prior executive order banning so-called COVID-19 Vaccine Passports, issued in



A. Kevin Troutman

Senior Counsel

713.292.5602

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April, avoided mandates to private business except where state funding was involved.

The governor's authority to issue this Order is likely to be challenged. The Order was issued under the authority of the Texas Disaster Act which expressly limits the governor's authority to issue orders that "interfere with the course or conduct of a labor dispute" unless such action is necessary to "forestall or mitigate imminent or existing danger to public health or safety." §418.003(2). Challengers will likely argue that limiting an entity's ability to impose conditions of employment, such as vaccine mandates, is a labor issue outside of the reach of his authority, especially in light of his statements in the issuance announcement of EO-40 where he states that "the COVID-19 vaccine is safe, effective, and our best defense against the virus."

2. EO-40 Significantly Expands Bases for Objecting to Vaccination, Beyond Those Established Under Federal law.

Title VII and the ADA permit employees to receive exemptions from vaccine mandates based upon either sincerely held religious beliefs or medical conditions that prevent them from receiving the COVID-19 vaccine. EO-40 seems to broaden the scope of permissible objections substantially. It forbids entities from compelling vaccination for individuals that object on three different bases:

- for any reason of personal conscience;
- based on a religious belief, or
- for medical reasons, *including* prior recovery from Covid-19.

Opinions differ and the answer is not clear, but the "personal conscience" objection appears to be a distinct new basis to obtaining an exemption from a vaccine requirement, a basis that is not required to be rooted in religious beliefs.

If the "personal conscience" objection is not required to be based on religious beliefs, then it reaches well beyond the protections of Title VII, which does *not* provide protection from discrimination based on personal, non-

spiritual preferences. This personal conscience objection is similar to other Texas laws that provide for exemptions for vaccine requirements for students in school settings based on medical, religious, or personal reasons and in healthcare facilities where employees may be exempt from vaccines based on reasons of conscience, *including* a religious belief. Notably, however, EO-40 presumably goes beyond the scope of even these Texas laws as the Attorney General of Texas has opined that *private* schools for example, as non-state actors, are *not required* to accept medical or conscience objections. EO-40 provides no basis for analysis of the sincerity or basis for this objection.

Similarly, EO-40 makes no reference to “sincerely held” religious beliefs, a consideration that exists under Title VII. This could present material concerns in view of the prevalence of boiler plate religious accommodation requests that employers across the country have been receiving recently.

EO-40 also exceeds protections provided under ADA by including “prior recovery from COVID-19” as a permissible basis for a medical objection. Employees requesting medical exemptions from a vaccine under the ADA must have a “qualifying disability under the ADA,” but EO-40 provides no such limitation. It could therefore be interpreted to allow any individual who has been previously diagnosed from and recovered from COVID-19 to object to vaccination. Under federal law, employees may be excused from vaccination until 90 days after recovery from the virus, but would then be subject to a vaccination requirement. The medical justification for this objection is contrary to the CDC’s guidance on the issue.

3. Texas’ EO-40 is Silent as to Employer *Policies* Requiring *Proof* of Vaccination as a Condition of Employment or the Issue of At-Will Employment in Texas.

EO-40 departs from the governor’s prior orders in other ways. The Vaccine Passport Ban prohibits state agencies from adopting *policies* or requiring *proof* of vaccination as a *condition* of receiving services. In a notable contrast, EO-40 does not expressly forbid proof of vaccination as a condition of employment. Instead, it specifically forbids an entity from “*compelling* receipt of a COVID-19 vaccine.” By aiming squarely on the *act* of receiving a vaccination as opposed to *policies* requiring proof of

vaccination, the Order gives rise to more ambiguity. In other words, employers may argue that they are not “*compelling receipt*” of a vaccine so long as that they do not intend to strap an employee down to a chair and force a vaccine needle into a worker’s arm, which they do not. Instead, that worker always has a choice: they can refuse to get vaccinated, but the consequence is that they will lose their job. Thus, another question is whether employer policies requiring vaccination as a condition of employment would be considered coercive enough to be deemed a violation of EO-40’s bar on compelling receipt of a COVID-19 vaccination.

In a larger context, considering the Texas’ at-will employment environment and the narrow availability of a “wrongful termination” cause of action in Texas, it is not clear that an employer “compels” an individual to be vaccinated by making it a condition of employment. When similar arguments were considered by [Federal District Court Judge Lynn Hughes in a lawsuit over a Houston hospital’s vaccine mandate](#), the Court said that a plaintiff employee could “choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else.” Put simply, the Court felt that employees who disagreed with a vaccine mandate could just seek another job and were thus not being forced to get vaccinated. Proponents of EO-40 are likely to disagree, but the answer to whether vaccination as a condition of employment amounts to compulsion under the Order is unclear.

4. EO-40 Likely Conflicts with Federal Contractor Requirements, the Forthcoming OSHA ETS, Expected CMS Rules for Medicare/Medicaid Recipients, and ERISA.

Governor Abbott’s Order expressed opposition to President Biden’s COVID-19 Action Plan, particularly its vaccine mandates. While EO-40 became effective immediately, [rules implementing President Biden’s Plan are still emerging](#). Absent an unexpected change in direction, some federal rules are likely to clash in key respects with the Texas Order. Where those conflicts exist, federal law is expected to trump state law. The new federal rules are not applicable across-the-board, however, so their impact on each employer must be examined.

Federal Contractor Mandate

The vaccine mandate, issued by the [Safer Federal Workforce Task Force for federal contractors and subcontractors](#), requires employees of covered federal contractors to be fully vaccinated by December 8, with some exceptions, including for those entitled to an accommodation. Once effective, this mandate will likely supersede Texas' EO-40 for federal contractors with contracts or subcontracts that include a clause requiring compliance with the Biden EO. However, not all contracts or contractors are subject to the mandate, meaning that some may still be subject to Texas' EO-40 restrictions.

OSHA Vaccine/Testing Emergency Temporary Standard

EO-40 and the upcoming OSHA Vaccine/Testing ETS may not conflict. [The anticipated OSHA ETS](#) will require all employers with 100 or more employees to either ensure their workers are vaccinated or require unvaccinated employees to produce a weekly negative test result before coming to work. Because the Order does not prohibit testing, that weekly testing option in lieu of vaccination would permit employers in Texas to abide by both the upcoming OSHA ETS and the Texas EO by permitting vaccine objectors to be tested each week. The OSHA ETS is expected to be released soon.

Healthcare Mandate for Medicaid Recipients

The Centers for Medicare & Medicaid Services is also expected to publish a rule soon that will expand a COVID-19 vaccine mandate to most healthcare providers ("[Healthcare Mandate](#)"). It will require healthcare provider employers to mandate employee vaccinations as a condition of participation in the Medicare and Medicaid programs. Significantly, unlike the OSHA ETS, this Healthcare Mandate is not expected to include a testing option, which would appear to place it in direct conflict with, and likely preempt, EO-40, to the extent it may preclude accommodations for objectors (such as on the basis of personal conscience) in lieu of vaccination.

ERISA and Employee Benefits

Additionally, employer wellness plans that require employees to get vaccinated to receive incentives, such as discounts on health care premiums, will also likely not

be limited by EA-40, in part because participation in these programs is voluntary. Additionally, as such wellness plans and employee health benefits are typically governed by ERISA, federal law would likely preempt any conflicts with EO-40.

5. Enforcement in Texas is Unclear but Similar Actions in Other States May be Forthcoming

As in previous Texas orders such as the "[COVID-19 Passport Ban](#)" and the order banning local governments and school districts from requiring masks or vaccinations, a violation of EO-40 can result in a maximum fine of up to \$1,000 per violation. It is unclear whether that fine is "per policy," "per day," or even "per employee." EO-40 does not establish a private right action for employees to sue if they feel they have been compelled to take the vaccination.

Thus far, issuance of related fines, if any, have largely gone unreported in Texas and it is unclear how strongly EO-40 will be enforced, if at all. However, employers may expect similar orders or statutes to arise in states with constituents raising similar objections to vaccinations. Again, employers should remain alert for similar developments in other states.

What Options are Available to Employers?

In view of these issues, employers are taking various approaches, which can vary depending upon the nature of their businesses, their current policies, and which federal rules are applicable to them. Some employers are simply delaying implementation of any vaccination mandates until the forthcoming OSHA ETS rule is effective.

After assessing the risks, other employers are proceeding as though EO-40 was never issued, maintaining existing vaccine mandates where they are in place. Among other things, they expect any conflicts between Texas and federal law to be resolved in favor of the federal law and guidance that they have been following all along. This is obviously a higher risk approach because it could result in fines – potentially substantial ones – if Texas aggressively enforces this order.

Employers who have current vaccine policies in place and are seeking a lower-risk approach may continue to

implement existing vaccine mandates by revising their procedures to consider additional categories of exemption requests from employees in Texas. Specifically, these employers should take into account the implications of the new “personal conscience” and “prior recovery from COVID-19” bases for exemptions and provide testing as an accommodation in lieu of vaccination for Texas employees who present such objections. This is a lower-risk approach because it more closely abides by both the Texas Order and the forthcoming OSHA ETS if applicable. This approach would of course require appropriate training of supervisors and communications with employees who are impacted.

In each case, the path forward for employers depends upon the nature of your business, the federal rules that most impact your operations, and your tolerance for risk. We will monitor these developments and provide updates. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have question, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our [FP Vaccine Subcommittee](#) or in [any of our Texas offices](#).