



# New Tennessee Law Restricts Workplace Vaccine Requirements: What Should Employers Do?

Insights

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In response to OSHA's Vaccination and Testing Emergency Temporary Standard that seeks to require covered employers across the country to either mandate the vaccine or test for COVID-19 on a weekly basis, Tennessee Governor Bill Lee recently signed sweeping new COVID-19 legislation into law to counteract the federal mandate-or-test rule. The new law took immediate effect when he signed it on November 12, restricting employers' and businesses' ability to require proof of COVID-19 vaccination and take adverse actions against employees for refusing to show proof COVID-19 vaccination. It also prohibits public employers and public schools from mandating vaccination or requiring masks on premises unless certain conditions are met. Additionally, the new law – creating Title 14 of the Tennessee Code – provides that employees may collect unemployment benefits if they are separated from employment as a result of refusing to receive a COVID-19 vaccine. Considering the conflict with the OSHA ETS, which is currently blocked by a federal court order, and the expected wave of lawsuits challenging Title 14, Tennessee employers might feel they are stuck between a rock and a hard place. Below is our assessment of how Title 14 impacts your ability to impose vaccination requirements and mask mandates and how you should reconcile the conflicting Tennessee and federal law.

## Who is Covered by Title 14?

The restrictions imposed under Title 14 broadly apply to public and private employers who employ one or more persons in the state, government entities, and public schools, including charter schools. Excluded from the requirements of Title 14 are federally regulated employers who are subject to penalties for non-adherence to federal rules and regulations, such as businesses operating on property owned, managed, or secured by the federal government and facilities that prepare food for distribution and consumption, but only to the extent the employer is subject to a valid and enforceable federal requirement that conflicts with Title 14.

Additionally, most healthcare providers governed by the U.S. Centers for Medicare & Medicaid Services (CMS) are exempt from these prohibitions if they are subject to the CMS Interim Final Rule requiring vaccination as a condition of participation. Likewise, the law allows federal contractors subject to Executive Order 14042, which mandates covered federal contractors to require employees be vaccinated by December 8, to apply for an exemption.

## When Does Title 14 Take Effect?

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Title 14 went into immediate effect on November 12. However, a federal judge in Nashville issued an injunction on Sunday blocking the portion of the law prohibiting mask mandates in public schools unless certain conditions are met while a lawsuit challenging the provision is pending. Although the Court's order does not address whether the injunction applies to all public schools in Tennessee, or just those involved in the lawsuit, several counties around the state have relied on the injunction to continue enforcing mask mandates. Additionally, in Shelby County, an injunction issued in September blocking Governor Lee's Executive Order requiring schools to allow parents to opt-out of mask mandates will remain in place despite Title 14's restrictions.

## How are Vaccine Mandates Affected?

Private employers who employ one or more employees within Tennessee, governmental entities, and schools are prohibited from requiring proof of COVID-19 vaccination or taking adverse action against an employee or applicant for refusing to provide proof of vaccination *if the employee or applicant objects to vaccination for any reason*. Additionally, by allowing employees to object to vaccination for *any reason*, which may include political or moral objections, Title 14 expands employees' bases to object to vaccination beyond federal accommodation requirements. You may want to consider consulting with your labor and employment attorney to discuss whether you need to make any revisions to your existing vaccine policies to ensure compliance with Title 14.

For the purposes of this law, employers may not deny employment or other benefits, discharge, threaten, or otherwise discriminate against employees or applicants for refusing to provide proof of vaccination "in any manner that affects the employee's employment, including compensation, terms, conditions, locations, rights, immunities, promotions, or privileges." Additionally, businesses and public schools are precluded from requiring proof of vaccination for members of the public to access the premises or receive benefits, products, or services of the business or public school.

Title 14 also prohibits covered governmental entities and public schools from mandating COVID-19 vaccinations altogether.

## How Does the New Law Limit Your Masking Requirements?

If you are a private employer, you may continue to set your own masking policies and require both employees and members of the public to wear masks as a condition of employment, entering the premises, or receiving services. State public employers, local governmental entities, and publicly funded private employers are prohibited from requiring masks unless certain conditions are met, as discussed more in Title 14.

Title 14 additionally prohibits public schools from mandating masks unless certain conditions exist and the school takes certain steps to gain approval of the mandate. However, as discussed above, this provision of the law is subject to injunctions in at least two Tennessee counties.

## What Can You Do Without Violating Title 14?

As discussed above, as a private employer, you may still require employees, customers, vendors, and other members of the public to wear masks as a condition of employment or to access your premises. Additionally, because Title 14 prohibits private employers from *compelling* employees or applicants to provide proof of vaccination, you may still ask employees and applicants to *voluntarily* provide proof of vaccination. Title 14, however, states that employers may not take adverse action if an applicant or employee refuses to provide proof of vaccination for any reason.

### **What Happens to Employees Who Quit or Have Quit Over Your Vaccine Policy?**

With Title 14, you may expect to see an increase in unemployment claims. Employees who voluntarily terminate their employment for refusing to receive a COVID-19 vaccine or to provide proof of COVID-19 vaccination are now entitled to unemployment benefits. These benefits can be collected retroactively if benefits were previously denied because the separation of employment was due to the employee's refusal to receive or show proof of vaccination. Before contesting any unemployment claim, check with your FP employment attorney to determine the best strategy and course of action.

### **What Happens If You Violate Title 14?**

If you violate Title 14, you can be sued. Title 14 creates a private right of action, allowing employees and members of the public to sue for injunctive relief, compensatory damages, and attorneys' fees if they believe they have been injured.

### **How Do You Reconcile Conflicting Tennessee and Federal Law?**

Meanwhile, the OSHA ETS explicitly preempts states from adopting and enforcing workplace requirements relating to vaccination, masking, and COVID-19, except under the authority of a federally approved "State Plan." It also invalidates any state or local requirements that ban or limit an employer's authority to require vaccination, masks, or testing.

Of course, the OSHA ETS has been blocked by a federal court order, pending resolution of multiple lawsuits challenging the OSHA ETS through a combined multidistrict litigation that now sees the challenges consolidated in the Sixth Circuit Court of Appeals (which, coincidentally, is the same appellate circuit governing claims arising in Tennessee). However, should the Sixth Circuit Court of Appeals determine the OSHA ETS passes legal muster, Title 14 will be preempted by and invalidated by the federal rule once it takes effect. In addition to possible preemption by the OSHA ETS, there are additional federal laws that may preempt Tennessee's new law, so check with your employment counsel if you face conflicting obligations.

Because Tennessee is an OSHA State Plan state, it enforces its own workplace safety regulations under the authority of the Tennessee Occupational Safety and Health Administration (TOSHA). TOSHA is required to either adopt the OSHA ETS or adopt a similar standard that is "at least as effective in

providing safe and healthful employment and places of employment as the standards promulgated” under federal OSHA within 30 days of the effective date of the ETS.

While we await potential enactment of the OSHA ETS, which could trigger TOSHA’s obligation to enact a similar rule, Tennessee employers are essentially stuck in limbo. Many are confused and report facing major headaches trying to decide whether to risk potential lawsuits for failure to comply with Title 14 or potential fines for failing to comply with the OSHA ETS, should it become effective.

As a result, each employer should make a case-by-case determination on how best to comply with Title 14 for the time being – while remaining prepared to comply with the OSHA ETS if it takes effect and if you are a covered employer. Although it may take weeks or months to resolve the current lawsuits filed challenging the OSHA ETS and the inevitable lawsuits that will be filed challenging the validity of Title 14, the OSHA ETS could become effective at any time. That would require you to achieve compliance within the original December 5 deadline or within a slightly revised timeline, and you should begin preparations now for compliance in accordance with [Fisher Phillips five-step action plan](#), including:

- Preparing to establish, implement, and enforce a written policy on vaccination, testing, and face coverings;
- Preparing communications to employees to provide certain information to employees on vaccines and the requirements of the ETS;
- Preparing to provide paid time off to employees to obtain the vaccine and reasonable time and paid sick leave to recover from side effects following each dose;
- Developing a system to obtain and maintain records of employee vaccination status; and
- Creating procedures to comply with certain notice requirements for positive COVID-19 cases and to report work-related COVID-19 fatalities or hospitalizations to OSHA.

## Conclusion

Fisher Phillips will continue to monitor this developing situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips’ Insight system](#) to get the most up-to-date information. If you have questions, visit our [Comprehensive FAQs for Employers on the OSHA Vaccine Emergency Temporary Standard \(ETS\)](#), [Vaccine Resource Center for Employers](#), or contact your Fisher Phillips attorney, the authors of this Insight, any attorney on our [FP Vaccine Subcommittee](#), or any attorney in [our Tennessee offices](#).

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