



# Florida Passes Legislation Banning Vaccine Mandates: What Employers Need to Know

Insights

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During a special legislative session, Florida just passed a new law banning private employers from mandating COVID-19 vaccines unless several exemptions are offered to employees. The law, signed by the governor today, comes as OSHA's national emergency temporary standard mandating vaccines is embroiled in legal challenges. What do Florida employers need to know about this new law, which takes effect immediately?

## Who is Covered and What Does It Do?

The law applies to all private employers in Florida, regardless of size. It prohibits those employers from requiring employees to get vaccinated against COVID-19 unless various exemptions are offered.

## What are the Exemptions?

Some of the exemptions in the new law will sound familiar to employers. Others are unique. If an employer receives a statement from an employee (as described below), they **must** allow the employee to opt-out of the vaccine mandate. The Department of Health will be creating template forms for each of these exemptions.

### 1. **Medical Reasons**

This includes for reasons of pregnancy or anticipated pregnancy. To receive a medical exemption, an employee must submit a signed statement by a physician or physician assistant that vaccination is not in the best interest of the employee. While not addressed in the legislation, we suspect that this exemption will function similarly to those provided for disabilities under the Americans with Disabilities Act (ADA).

### 2. **Religious Reasons**

An employee must present a statement that they decline the vaccine because of a "sincerely held religious belief." Although that term is undefined, it likely refers to sincerely held religious beliefs as understood under federal law.

### 3. **COVID-19 "Immunity"**

An employee must show “competent medical evidence” that they have immunity to COVID-19, which is documented by the results of laboratory testing on the employee. The law does not state what “immunity” is but directs the Department of Health to establish a standard for determining that immunity.

#### 4. ***Periodic Testing***

An employee must provide a statement indicating that they will comply with the employer’s requirement to submit to regular testing. Although “regular testing” is not defined, the law directs the Department of Health to adopt emergency rules specifying requirements for frequency of testing. Importantly, any testing must be at **no-cost to the employee**.

Because this exemption has no ties to existing federal law such as Title VII and the ADA, and the law does not address any “undue hardship” defense, it is likely that an employer cannot decline to pay for the testing if there is a charge the employee would otherwise incur.

#### 5. ***Agreement to Use PPE***

An employee must present a statement that they agree to comply with the employer’s reasonable written requirement to use employer-provided personal protective equipment when around others. “Personal protective equipment” is not defined. It is unclear whether the use of the term would implicate OSHA regulations or CDC guidance on “personal protective equipment.”

### **But What About Federal Law?**

The CMS Rule and Federal Contractor vaccine mandate requirements, which both require that covered staff be vaccinated and only allow for exemptions for medical conditions (ADA) and sincerely held religious beliefs (Title VII), should preempt this Florida law to the extent the laws directly conflict. The CMS Rule explicitly provides that it preempts state and local laws.

If OSHA’s ETS survives in the courts, it is likely that Florida’s new law will conflict with the OSHA ETS at least in so far as an employer (with 100 or more employees) might want to implement a mandatory vaccination policy instead of allowing employees to choose to be vaccinated or undergo weekly testing. However, the scope of that conflict is unknown and will depend on the final terms of the ETS if it survives.

### **How is the Law Going to be Enforced?**

Florida’s vaccine mandate law will be enforced by the Department of Legal Affairs, in the Attorney General’s office. Employees can file complaints that an exemption was not offered or was improperly applied or denied, which will then be investigated. If the Department finds a violation, it must notify the employer of its determination and allow the employer the opportunity to cure the noncompliance. If the Department finds that an employee was improperly terminated and the employer does not restore the employee to their position with back pay, then the Department may fine the employer up

to \$50,000, depending on employer size and other factors. Employees who are wrongfully terminated may also be entitled to unemployment benefits. The Department of Legal Affairs will be issuing rules to further flesh out the complaint and investigation process.

### **What We Don't Know Yet**

There are many unanswered questions. For example, the new law does not address workers' compensation claims and remains an open question whether an employee's side effects to a mandated vaccine is covered by workers' compensation.

### **What About Public Employers or Schools?**

The legislature also passed statutes banning vaccine mandates for public employees and prohibiting any public educational institution or elected or appointed local official from imposing a COVID-19 vaccination mandate for any student. Unlike private sector employers, public sector employers are prohibited from mandating the vaccine — even if they offer the enumerated exemptions.

There are also provisions prohibiting public schools from requiring a student to wear a face mask, a face shield, or any other facial covering. Instead, such issues are left to the parent's sole discretion. Further, the law prohibits public schools from barring any student or employee from school or school-sponsored activities or subjecting them to other disparate treatment based on an exposure to COVID-19, so long as the student or employee remains asymptomatic and has not received a positive test for COVID-19.

### **What Employers *Can Do***

Importantly, the law is not an outright prohibition on vaccine mandates. Private employers can still have a vaccine mandate, so long as you offer the various exemptions discussed above.

Neither does the law prohibit employers from “stacking” their COVID-19 prevention and mitigation efforts. Meaning, for example, you likely can still require *both* use of PPE and regular testing in order to protect its workforce. In other words, the statute is a ban on vaccine mandates without certain opt-out accommodations, but it is not a ban on your organization opting to require testing and/or continued use of PPE.

It is worth noting that this new law *does not address* employers' immunity against COVID-19 claims. In March 2020, Florida passed a law granting businesses immunity from COVID-19 claims. Absent any more specific legislation, if an employer meets the standards of the immunity law (specifically, demonstrating good faith effort to comply with government-issued health guidance), the language of the immunity law is clear that the employer is immune from civil liability. This new law does not affect that.

You should also keep an eye out for the implementing rules to be issued by the various state agencies. According to the statute, such rulemaking must occur initially by filing emergency rules within 15 days after the effective date of the statute, followed by regular rulemaking thereafter. For the next 15 days (unless the Department of Health files its emergency rules earlier), employer COVID-19 vaccination mandates are deemed invalid under this statute.

## **What's Next?**

This new law is yet another issue facing employers, who are increasingly confronting a myriad of conflicting orders at the state and federal levels. Unfortunately, the issue of COVID-19 vaccines in the workplace remains incredibly fluid and will surely continue to evolve through the holiday season. As always, we will continue to monitor the situation regarding employers' vaccine mandates and provide updates as warranted. Until then, Fisher Phillips has created [a set of comprehensive FAQs for employers on the OSHA ETS](#) to help you navigate through this process.

Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [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 Florida offices](#).

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