

COVID-19: TEXAS GOVERNOR ISSUES EXECUTIVE ORDER BROADENING EXEMPTIONS TO COVID-19 VACCINATIONS MANDATES—WHERE DO EMPLOYERS GO FROM HERE?

Date: 12 October 2021

U.S. Labor, Employment, and Workplace Safety Alert

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As employers across the country await additional rules related to COVID-19 vaccination mandates for employers with more than 100 employees, companies in the State of Texas are now subject to certain restrictions on their ability to require COVID-19 vaccination for both employees and consumers. On 11 October 2021, the governor of the State of Texas, Greg Abbott (Gov. Abbott) issued [Executive Order No. GA-40](#) (the Texas Order), prohibiting any entity in the State of Texas from compelling any individual, including an employee, to receive a COVID-19 vaccine, if the individual objects for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19. Gov. Abbott has called upon Texas lawmakers to pass a law similar to the Texas Order.

The penalty for failing to comply with this Texas Order is a fine up to US\$1,000.00. Although not clear from the face of the Texas Order, it is presumed that this fine will be assessed per violation (i.e., an employer could be charged a fine for every employee it compels to receive the vaccine). Effective immediately, the Texas Order specifically supersedes any conflicting order issued by local officials in Texas. Importantly, the Texas Order provides no exceptions for healthcare businesses, including hospitals and other healthcare providers. Further, Gov. Abbott has instructed the Texas legislature to consider this issue during the current legislative session and pass legislation codifying this prohibition. If and when such legislation goes into effect, Gov. Abbott will rescind the Texas Order.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Although brief, the Texas Order will impact business in the State of Texas, including private employers, who have implemented or are contemplating vaccination mandates for employees, as the exemptions permitted by the Texas Order extend beyond those required under the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act (Title VII). In May 2021, the Equal Employment Opportunity Commission (EEOC) [advised](#) that federal laws, such as the ADA, Title VII and Genetic Information Nondiscrimination Act of 2008 (GINA), are not violated by employers mandating vaccines for their employees, provided that the employers accommodate for pregnancy, disabilities and sincerely held religious beliefs. As of 11 October 2021, for business in Texas, the Texas Order requires entities to permit exemptions for “reasons of personal conscience,” which is undefined by the Texas Order, is not a recognized concept under federal laws and may be broadly interpreted by the State of Texas. “Reasons of personal conscience” could practically include:

- Objections to vaccines in general;
- Objections specific to the COVID-19 vaccine, such as the amount of time in which the COVID-19 vaccine was developed, or
- Personal preference to simply not receive the vaccine at this time.

The Texas Order also leaves open questions relating to how employees can prove they qualify for certain exemptions and supporting document requirements. The Texas Order specifically includes prior recovery from COVID-19 as a valid medical reason for not receiving the vaccination. That has not been a widely accepted reason for granting a medical exemption from vaccination because it runs counter to current [CDC guidance](#) on this topic. However, the Texas Order does not state whether employers must accept an employee's representation that he or she previously had COVID-19, or whether they can require documented proof of a COVID-19 diagnosis before granting an exemption.

Nor does the Texas Order address documentation requirements for religious and other disability exemption requests. Another looming question is whether employers in Texas can deny an exemption request on the basis of undue hardship, as permitted by federal law.

On its face, the Texas Order does not prohibit employers from imposing COVID-19 testing requirements and health screenings for employees, either in general or as an alternative to vaccination. In fact, with more employees entitled to avoid vaccinations under the Texas Order, employers may need to implement more stringent workplace health and safety protocols, especially if they are to comply with current Occupational Safety and Health Administration (OSHA) guidelines that address protections for both vaccinated and unvaccinated workers (detailed [here](#)). With more employees eligible for an exemption from the COVID-19 vaccination under the Texas Order, which was already quite broad, employers in Texas may need to revert to other safety measures to protect their workforce.

Entities operating in Texas also should evaluate their vaccination policies related to customers, visitors, or events, as the Texas Order also applies to consumers. It is presently unclear if under the Texas Order, entities are permitted to ask consumers for proof of vaccination status in the first instance or must avoid the inquiry altogether.

HOW DOES THE TEXAS ORDER AFFECT VACCINATION MANDATES IMPLEMENTED PRIOR TO 11 OCTOBER 2021?

The Texas Order is effective immediately, and does not appear to apply retroactively. However, employers who are currently evaluating accommodation requests under a mandatory policy will need to incorporate the expanded reasons for an employee's objection to the COVID-19 vaccines.

WHAT ABOUT FEDERAL CONTRACTORS, HEALTHCARE EMPLOYERS, AND PRIVATE EMPLOYERS WITH MORE THAN 100 EMPLOYEES?

On 9 September 2021, President Biden announced his [comprehensive national strategy](#) for addressing the COVID-19 pandemic including multiple directives and actions targeted at federal, private-sector, and healthcare employers, as detailed more fully [here](#). President Biden's strategy includes a directive to OSHA to issue an

emergency temporary standard (ETS) that would require private employers with 100 or more employees to either mandate the COVID-19 vaccine for its workforce or require weekly COVID-19 testing before reporting to a worksite. President Biden also has required, by Executive Order, federal agencies to include a clause in certain federal contracts providing that contractors must comply with all workplace safety guidelines issued by the Safer Federal Workforce Task Force, including requiring COVID-19 vaccinations (as detailed [here](#)). President Biden's announcement also included an expanded directive to the Centers for Medicare and Medicaid Services (CMS) to require employees of all healthcare facilities that receive funds from Medicare and Medicaid to be fully vaccinated.

In issuing the Task Force FAQs on the federal contractor mandate, the federal government already anticipated a potential conflict with individual state actions and has taken the position that contrary state laws will be preempted. Texas presumably will take the opposite position and seek to enforce the Texas Order as well as any future legislation. For now, federal contractors in the State of Texas are put in the impossible position of determining which of the conflicting standards they will follow. As for healthcare employers in Texas, once the CMS interim final rule is issued, there may be more clarity as to the scope of permitted exemptions. However, the CMS interim final rule likely will follow the federal contractor mandate and provide for exemptions only on the basis of a medical condition or a sincerely held religious belief, placing healthcare employers in that same difficult position. Finally, private employers in the State of Texas that will be subject to the ETS will likely be required to mandate the COVID-19 vaccine, or require weekly COVID-19 testing for all employees. Since it is anticipated that the ETS will allow for weekly COVID-19 testing regardless of reason, Texas employers could allow employees who have a personal, religious, or medical reason (including prior COVID-19 infection) to be exempt and be tested on a weekly basis without running afoul of the Texas Order.

MAY EMPLOYERS OFFER INCENTIVES FOR EMPLOYEES TO GET VACCINATED UNDER THE TEXAS ORDER?

As issued, the Texas Order only prohibits employers from compelling employees to provide proof of vaccination against COVID-19 when they object on personal, religious, medical, or past infection grounds. Therefore, so long as an incentive program is designed to be voluntary in nature and in accordance with current EEOC guidelines (as detailed [here](#)), Texas employers should not be in violation of the Texas Order. Likewise, for employers that are self-insured, it is believed that the Employee Retirement Income Security Act of 1974 (ERISA), the federal law governing these plans, preempts the Texas Order.

The K&L Gates Labor, Employment and Workplace Safety group can assist with all aspects of a mandatory vaccination program, including determining coverage under the various directives and proposed regulatory actions, addressing compliance with federal and state laws, developing COVID-19 safety policies and procedures, and crafting communications to employees and contractors.

K&L Gates continues to advise clients on navigating the COVID-19 pandemic. More information about K&L Gates' COVID-19 resources is available on the K&L Gates [HUB](#).

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