

COVID-19: FLORIDA CURTAILS VACCINATION MANDATES FOR PRIVATE EMPLOYERS

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OVERVIEW

On 15 to 17 November 2021, the Florida legislature debated and passed four bills that address COVID-19 issues related to employees and parents/students. On 18 November 2021 and effective immediately, Florida Governor Ron DeSantis signed into law Senate Bill (SB) 2-B and its companion House Bill (HB) 1-B,¹ as well as HB 3-B/SB 4-B,² HB 5-B/SB 6-B,³ and HB 7-B/SB 8-B.⁴

HB 1-B/SB 2-B prohibits private employers from imposing a COVID-19⁵ vaccination mandate for any full-time, part-time, or contract employee without also providing five individual exemptions from receiving the vaccine. Specifically, the new law provides that Florida private employers that want to mandate the COVID-19 vaccine must provide for and recognize the following five exemptions: (i) medical reasons, including, but not limited to, pregnancy or anticipated pregnancy; (ii) religious reasons; (iii) COVID-19 immunity; (iv) periodic testing; and (v) the use of employer-provided personal protective equipment. The new law requires employers to use [forms created by the Florida Department of Health](#),⁶ or substantially similar forms, for employees to submit exemption statements. The law also prohibits government entities from requiring anyone, including employees, to receive the COVID-19 vaccine. In addition, educational institutions may not require students to be vaccinated,⁷ and school districts are not permitted to require students and staff to wear face masks. The law further prohibits school districts from quarantining healthy students who were exposed to COVID-19 but do not show any symptoms.⁸

Despite the immediate effective date, the law provides that the Florida Department of Health, Department of Legal Affairs, and the Department of Economic Opportunity will develop emergency rules to implement the law within 15 days. An employer COVID-19 vaccination mandate is deemed invalid until the Florida Department of Health files its emergency rules or 15 days after the effective date of the new law, whichever occurs first.

If a Florida private employer maintains a vaccination mandate that does not provide the five Florida exemptions, and the employer terminates an employee based on such mandate, the new law requires the Florida Attorney General to impose a fine of up to (i) US\$10,000 per violation for an employer with fewer than 100 employees, and (ii) US\$50,000 per violation⁹ for an employer with 100 or more employees. However, the new law provides that the Florida Attorney General may not impose a fine if an employer reinstates a terminated employee with back pay to the date that the complaint was received by the Florida Department of Legal Affairs. Importantly, the new law provides no exceptions for healthcare businesses, including hospitals and other healthcare providers, setting up a direct conflict with federal vaccination mandates.

WHAT ARE THE VACCINE MANDATE EXEMPTIONS FOR PRIVATE EMPLOYERS?

To claim an exemption based on *medical reasons*, the employee must present an exemption statement, dated and signed by a physician, a physician assistant, or an advanced practice registered nurse, who has examined the employee. The statement must provide that, in the professional opinion of the physician, physician assistant, or advanced practice registered nurse, the COVID-19 vaccination is not in the best medical interest of the employee.

To claim an exemption based on *religious reasons*, the employee must present an exemption statement indicating that the employee declines the COVID-19 vaccination because of a sincerely held religious belief.

To claim an exemption based on *COVID-19 immunity*, the employee must present an exemption statement demonstrating competent medical evidence¹⁰ that the employee has immunity to COVID-19, documented by the results of a valid laboratory test performed on the employee.

To claim an exemption based on *periodic testing*, the employee must present an exemption statement indicating that the employee agrees to comply with regular testing¹¹ for the presence of COVID-19. The testing must be paid for by the employer and provided at no cost to the employee.

To claim an exemption based on *employer-provided personal protective equipment*, the employee must present an exemption statement indicating that the employee agrees to comply with the employer's reasonable¹² written requirement to use employer-provided personal protective equipment when in the presence of other employees or persons. While not defined, reasonable personal protective equipment presumably includes masks. Employers will be required to pay for the personal protective equipment.

Notably, if an employer receives a completed exemption statement then the employer must allow the employee to opt out of the employer's COVID-19 vaccination mandate. Though not explicitly addressed in the new law, employers may be permitted to continue to offer incentives for employee vaccination. As passed, the new law only prohibits employers from compelling employees to provide proof of vaccination against COVID-19 when they raise one of the five permitted exemptions. Therefore, so long as an incentive program is designed to be voluntary in nature and in accordance with current Equal Employment Opportunity Commission (EEOC) guidelines (as detailed here), Florida employers should not be in violation of the HB 1-B/SB 2-B.

WHAT DOES THIS MEAN FOR PRIVATE EMPLOYERS?

The new law will affect businesses in the State of Florida, including private employers, who have implemented or are contemplating vaccination mandates for employees, as the permitted exemptions extend beyond those required under federal law, specifically, the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act (Title VII). In May 2021, the 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. However, the new Florida law provides broader protections in the form of much less stringent exemptions than those specifically authorized by EEOC.

WHAT DOES THE LAW MEAN FOR 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](#). In line with President Biden's directive, on 5 November 2021, the Occupational Safety and Health Administration (OSHA) released its emergency temporary standard related to COVID-19 (ETS) mandating COVID-19 vaccination or testing for employers with 100 or more employees. Shortly thereafter, the United States Court of Appeals for the Fifth Circuit granted an emergency motion to stay enforcement of the ETS and on 12 November 2021, the Fifth Circuit affirmed its decision, leaving the stay in place.¹³ In the midst of fast-moving litigation, employers have faced uncertainty as to whether they will need to comply with the ETS requirements. In the event the ETS goes into effect, Florida employees will need to address conflicts between the ETS requirements and Florida's new law to the extent its provisions are not preempted by the ETS.¹⁴ For example, HB 1-B/SB 2-B is silent on the frequency of testing required for an employee requesting a periodic testing exemption, providing for a potential conflict with the weekly requirement under the ETS. Further, the Florida law does not address whether employers in Florida can deny an exemption request on the basis of undue hardship, as permitted by federal law. Finally, by permitting employees to request an exemption based on COVID-19 immunity, the Florida law, similar to other recent state actions,¹⁵ directly conflicts with the ETS and runs counter to current CDC guidance on this topic. Therefore, employers will have to navigate compliance under the Florida law until a decision is rendered on the pending ETS.

Separately, President Biden also directed, 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](#)). Further, on 5 November, 2021, the Centers for Medicare & Medicaid Services (CMS) published an interim final rule with comment titled "Omnibus COVID-19 Health Care Staff Vaccination" (the IFC). The IFC establishes COVID-19 vaccination requirements for staff at 15 types of Medicare- and Medicaid-certified providers/suppliers, including but not limited to hospitals, critical access hospitals, ambulatory surgical centers, hospices, and skilled nursing facilities/nursing facilities. Accordingly, Florida federal contractors and certain Florida healthcare employers will need to address conflicts between federal requirements and Florida's new law. Though CMS has taken the position that the IFC preempts the applicability of any state or local law providing for broader exemptions,¹⁶ covered employers in the State of Florida are put in the impossible position of determining which of the conflicting standards they will follow.

As employers continue to navigate the myriad of federal, state, and local regulations, 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](#).

FOOTNOTES

¹ The bill will be codified at Section 381.00317, Florida Statutes.

² This bill provides an exemption for a public records request, in order to protect any employee who files a complaint about an employer not complying with the new vaccine law. If a request is made for public records involving an investigation of an employer for failing to meet COVID-19 vaccination exemption requirements, the complainant's name will not be disclosed, and other records need not be produced, including files containing personal medical or religious information.

³ This bill provides US\$1 million in funding for the Governor's Office of Policy and Budget to study whether Florida should take responsibility for workers' occupational safety and health by forming a state agency and leaving the federal Occupational Safety and Health Administration.

⁴ This bill repeals the right of the Florida Surgeon General to mandate COVID-19 vaccines, a right never exercised in Florida.

⁵ The bill defines COVID-19 as the novel coronavirus identified as SARS-CoV-2; any disease caused by SARS-CoV-2, its viral fragments, or a virus mutating therefrom; and all conditions associated with the disease, which are caused by SARS-CoV-2, its viral fragments, or a virus mutating therefrom.

⁶ The forms must include (i) a form for use by a physician, a physician assistant, or an advanced practice registered nurse to document an exemption based on medical reasons, including, but not limited to, pregnancy or anticipated pregnancy; (ii) a form for use by an employee to document an exemption based on religious reasons; (iii) a form for use by an employee to document an exemption based on COVID-19 immunity, which must include the laboratory criteria for proof of immunity for the virus that causes COVID-19; (iv) a form for use by an employee to document an exemption based on periodic testing, which must include the required frequency of testing and acceptable tests that may be used; and (v) a form for use by an employee to document an exemption based on employer-provided personal protective equipment.

⁷ This section of the new law will be codified at Section 381.00319, Florida Statutes.

⁸ This section of the new law will be codified at Section 1002.20, Florida Statutes

⁹ The new law provides that an employer who fails to comply with the exemption requirements for employees by terminating an employee based on a COVID-19 vaccination mandate commits a violation of the law.

¹⁰ The new law tasks the Florida Department of Health "to establish standards for competent medical evidence that the employee has immunity to COVID-19."

¹¹ The new law tasks the Florida Department of Health with adopting emergency rules to specify requirements for the frequency and methods of testing which may be used by employers.

¹² The new law does not define reasonable, but it presumably includes COVID-19 health and safety protocols suggested by the CDC and OSHA throughout the COVID-19 pandemic, including proper social distancing, hand-washing, and appropriate use of face coverings.

¹³ Despite this decision, since petitions challenging the OSHA ETS were filed in every geographically-based circuit court, the Judicial Panel on Multidistrict Litigation held a multi-circuit lottery on 16 November 2021

consistent with 28 USC § 2112, whereby all the petitions would be transferred to the winner of the lottery. The Sixth Circuit has been selected as the federal appellate court to hear all the consolidated petitions, and it is expected that the losing party in the Sixth Circuit will seek review of the stay order on an emergency basis by the U.S. Supreme Court. Justice Brett Kavanaugh is the assigned justice to hear emergency requests from the Sixth Circuit, although there is a potential in this instance that such an emergency request would be heard by the whole U.S. Supreme Court. In light of the stay order and ongoing litigation, OSHA has now indicated on its website that it has “suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.”

¹⁴ The ETS specifically provides for preemption of “inconsistent state and local requirements relating to these issues, including requirements that ban or limit employers' authority to require vaccination, face covering, or testing, regardless of the number of employees.” OSHA's authority to preempt inconsistent state or local requirements is derived from section 18 of the OSH Act as well as general principles of conflict preemption.

¹⁵ For example, on 11 October 2021, the governor of the State of Texas, Greg Abbott issued Executive Order No. GA-40, 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 (discussed [here](#)). Additionally, on 5 November 2021, the Alabama legislature passed, and Governor Kay Ivey signed into law, [legislation](#) that permits exemptions from a COVID-19 vaccination requirement based on a prior COVID-19 diagnosis.

¹⁶ [See CMS Omnibus Staff Vax Requirements – External FAQ](#)

KEY CONTACTS



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