

How to Approach Federal and State Conflicts on Workplace Vaccine Mandates

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When the White House announced COVID-19 vaccination requirements for federal employees and contractors—and a pending vaccine-or-testing rule for certain private employers—several states responded by initiating their own rules that allow for more exemptions than the federal requirements. This has caused confusion for many business leaders and HR professionals.

How should businesses approach their workplace vaccination policies in light of conflicting directives? "Employers should analyze the nature of their business, the federal rules that most impact their operations and their tolerance for risk before making any decisions regarding these ever-evolving issues," said Jacqueline Del Villar, an attorney with Fisher Phillips in Houston.

In the meantime, said Mini Kapoor, an attorney with Haynes Boone in Houston, employers should continue to strongly encourage vaccination in the workplace and follow all feasible COVID-19 safety recommendations in accordance with current guidance from the U.S. Centers for Disease Control and Prevention.

FEATURED RESOURCE CENTER

COVID-19 Vaccination Resources (www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx)

Conflicting Laws

Under President Joe Biden's Path Out of the Pandemic (<https://www.whitehouse.gov/covidplan/>) plan, federal employees will need to be fully vaccinated against COVID-19 by Nov. 22 and federal contractors will need to be vaccinated by Dec. 8. Additionally, a pending emergency temporary standard (ETS) (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/OSHA-Sends-COVID-19-Vaccination-Rule-to-White-House-for-Review.aspx) from the Occupational Safety and Health Administration (OSHA) is expected to require private-sector employers with at least 100 employees to ensure employees get vaccinated or submit to regular COVID-19 testing. Under these federal rules, employers will need to explore reasonable accommodations for workers with certain medical and religious objections.

Despite these federal directives, Texas Gov. Greg Abbott recently issued a broad executive order (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/reactions-to-texas-ban-on-vaccine-mandates.aspx) essentially banning vaccine mandates in the state. "No entity in Texas can compel receipt of a COVID-19 vaccine by any individual, including an employee or a consumer, who objects to such vaccination for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19," the order states.

Other states are taking similar action. On Oct. 13, Arkansas lawmakers sent a set of bills to the governor's desk that will give workers two options (<https://www.arkleg.state.ar.us/Bills/FTPDocument?path=/Bills/2021R/Public/HB1977.pdf>) if they choose not to get vaccinated: submit to weekly COVID-19 testing or submit proof biannually of natural antibodies from prior infection. Gov. Asa Hutchison said he will not sign or veto the bills, which means they will become law in 90 days if they are not blocked by a judge. Ohio lawmakers are considering proposals that would require employers to accept negative COVID-19 tests if they implement vaccination rules, and Montana prohibits employment discrimination based on vaccination status.

On the opposite end of the spectrum, a New York order requiring health care workers to get vaccinated did not include an exception for employees with sincerely held religious objections. However, a court temporarily blocked (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/coronavirus-new-york-religious-exemptions-vaccine-mandate.aspx) that part of the state's order while litigation ensues. The court said eliminating the religious exemption conflicts with employees' federally protected right to seek a religious accommodation.

"These controversies are likely only the tip of the iceberg in terms of a series of state measures and resulting lawsuits," said Jonathan Crotty, an attorney with Parker Poe in Charlotte, N.C. "When combined with the federal OSHA ETS, this will likely result in a messy and shifting patchwork of vaccine mandates and prohibitions that employers will need to navigate through."

Consider Which Rules Apply

When employers are covered by conflicting federal and state laws, the federal rules will generally pre-empt state law. Del Villar noted, however, that the new federal rules are not applicable across the board, so their impact on each employer must be reviewed individually.

The federal OSHA standard may not cover employers with less than 100 employees, and the federal contractor rules will not apply to many private employers. Employers in Texas not covered by those rules may need to comply with Abbott's order, Kapoor explained. She noted that employers in the health care sector may be covered by an anticipated vaccine mandate from the Centers for Medicare & Medicaid Services, which may also pre-empt the Texas order for covered workplaces.

Del Villar said companies with employees in Texas that are already 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 due to "personal conscience" and for "prior recovery from COVID-19."

Employers that will be covered by the upcoming OSHA ETS rule can accommodate employees with qualifying requests by offering weekly testing in lieu of requiring vaccinations, she added. "These practices can be modified as new federal rules are issued and/or legal challenges play out."

Some state bills that are in the works, such as the one in Arkansas, aim to require employers with vaccine mandates to allow employees the alternative to show proof of antibodies—which isn't expected to be an option in the pending OSHA ETS.

Del Villar said the OSHA ETS may include specific language stating that it supersedes any less-stringent state or local laws concerning vaccines. But employers should note that federal OSHA doesn't have jurisdiction over every private employer in the country. Though more than half the states are covered by federal OSHA, the agency allows states to develop their own workplace health and safety plans, as long as those plans are "at least as effective" as the federal program. State OSHA plans (<https://www.osha.gov/stateplans/>) may adopt the federal ETS or alternative measures—and enforcement is left to state agencies. Some state agencies may argue that plans allowing for more alternatives to vaccination than regular COVID-19 testing are "just as effective."

Tips for Employers

"Employers will have to adjust their policies carefully to comply with both the applicable federal rules as they are released and any new state requirements that may be issued," Del Villar said. "They should, of course, confer with their lawyer regarding any conflicts that appear to be irreconcilable."

She noted that any choices employers make about their policy should be well-documented and supported with appropriate employee communications and training.

Regardless of whether a state order is pre-empted for any specific employer, Kapoor said, all employers may benefit from tracking the vaccination status of their employees. This may help expedite compliance with applicable mandates as their deadlines approach.

Visit SHRM's resource hub page on the coronavirus and COVID-19 (www.shrm.org/resourcesandtools/pages/communicable-diseases.aspx).

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