

# State Actions Put Federal Contractors In COVID Vaccine Bind

By **Karla Grossenbacher** (October 20, 2021)

President Joe Biden issued executive orders on Sept. 9, that put into place requirements for federal contractors to mandate the COVID-19 vaccine for employees and for private employers with more than 100 employees to require that their employees either be vaccinated or submit to weekly testing.



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While many welcomed the president's action plan as a concrete step toward ending the pandemic that has gripped the country and the world for the past year and a half, others did not. And some state government executives and legislatures mobilized into action to counteract what they characterized as federal overreach.

Decrying Biden's executive orders as bullying, Texas Gov. Greg Abbott issued an executive order on Oct. 11 that purported to prohibit businesses in Texas from compelling employees to receive the COVID-19 vaccine who object "by reason of personal conscience, based on a religious belief or medical condition."

A couple of days later, on Oct. 13, Arkansas Gov. Asa Hutchinson allowed two identical bills to become law by failing to sign or veto them in five days that, as written, require any employer who mandates its employees to receive the COVID-19 vaccine to create an exemption process that allows employees to be exempt from such a mandate if:

- They provide a negative COVID-19 antigen test or molecular diagnostic test result no more than one time per week; or
- Provide proof of immunity, including demonstrating the presence of antibodies, T-cell response or proof of a positive COVID-19 test no more than twice a year.

In tacit acknowledgement that they cannot outright defy Biden's executive orders, Texas' executive order and the new laws in Arkansas do not prohibit vaccine mandates by employers altogether, but rather seek to undercut the mandates and limit their scope by requiring that employers provide a broader array of exemptions from the mandate to employees who object to being vaccinated for certain reasons or can satisfy alternative standards such as antibody testing or proof of a positive COVID-19 test.

Typically, when it comes to legislation involving employees, states can be more protective of employees than the federal government if they so choose. For example, many states recognize additional protected classifications under their employment discrimination laws that are not offered protection under federal law. In such instances, the federal and state laws can coexist because the state laws simply provide additional protections.

The Texas order and the Arkansas laws present a compliance quandary for employers who are subject to the vaccine mandate for federal contractor employers. The Texas executive order and the Arkansas laws do not conflict with the requirements of Biden's executive order for private businesses with more than 100 employees because that order does not require

employees to be vaccinated, but rather to choose between being vaccinated or being tested.

Under Biden's Executive Order 14042, a federal contractor employer is required to mandate the vaccine for certain of its employees and can exempt from the mandate only those employees who request to be accommodated for medical and religious reasons. The Texas order and the Arkansas laws require broader and additional exemptions not allowed under federal law.

Because federal contractor employers cannot comply with the terms of Executive Order 14042 in terms of the limits on accommodations and also provide the exemptions required under the Arkansas laws and the Texas executive order, federal contractor employers are left in the undesirable position of assessing which consequence of noncompliance they would rather face: potentially losing a lucrative federal contract or being debarred, versus paying whatever penalties might be imposed by Texas authorities or whatever damages that might be available in a wrongful discharge lawsuit under Arkansas state law.

Moreover, neither the Texas order nor the Arkansas laws allow for an undue hardship analysis whereas under federal law, employers do not need to accommodate employees with sincerely held religious beliefs and disabilities if the accommodation places an undue hardship on the employer.

Under the Texas executive order and the Arkansas laws, if the employee complies with the exemption process, the employee does not need to be vaccinated and cannot be terminated from employment for not being vaccinated no matter the impact on the employer's operations.

Worse yet for federal contractor employers, other states are proposing laws that would prohibit vaccine mandates altogether or ban discrimination based on vaccination status.

For example, on the day before Biden issued his executive orders, H.B. 75 was filed in the Florida Legislature, which would prohibit an employer from refusing to employ a person, bar a person from employment or discriminate against a person in any term or condition of employment based on the person's vaccination status. The bill was referred to the Pandemics and Public Emergencies Committee on Sept. 17.

Also, on the same day Biden issued his executive orders, Texas legislators proposed a law, H.B. 33, that would make it a Class B misdemeanor for any company or hospital to require that an employee receive a COVID-19 vaccination as a condition of employment. The bill was referred to the State Affairs committee on Oct. 12.

In addition, on Sept. 13, H.B. 39 was filed in Ohio, which would make it an unlawful employment practice to discriminate against an individual because the individual has not received the COVID-19 vaccine. Bills that prohibit discrimination based on vaccination status do not prohibit employers from mandating a vaccine, but would certainly make it impossible for an employer to enforce such a mandate.

If these bills are enacted, it remains to be seen what their ultimate effect will be. For example, prior to the issuance of Biden's executive orders, the state of Montana already had a law on the books that prohibits employers from discriminating against, refusing to hire or barring any person from employment based on vaccination status.

On Sept. 24, two weeks after the federal executive orders were issued, the Montana Department of Labor and Industry updated its FAQ regarding the Montana law to address its

interaction with the orders.

Conspicuously, the updated FAQ does not address the impact of the law on federal contractor employers. Instead, the FAQ provides that, (1) until the Occupational Safety and Health Administration emergency temporary standard is published, private businesses with 100 or more employees in Montana must comply with the Montana law, and (2) if a Montana citizen is required by a federal employer to be vaccinated, the Montana Human Rights Bureau has no jurisdiction over any complaint concerning a federal agency.

Federal contractor employers are left to guess what the state of Montana thinks their obligations are under its vaccination status discrimination ban.

The compliance landscape is rapidly changing — and often without notice — for employers who are subject to Biden's executive orders depending on where their employees are located. As lawmakers grapple with competing interests, it is employers who are caught in a whipsaw concerning compliance with state and federal requirements.

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