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Conflicting Orders: Can State Laws Thwart Federal Vaccine Mandates?

With the federal government and several states taking opposing positions on workplace vaccine mandates, many employers are left wondering whether they can enforce vaccine requirements on their employees and what accommodations they must provide. With federal deadlines looming, employers must be clear on their obligations.

Conflicting Mandates

As previously reported, on September 9, President Biden announced extensive new measures to combat the spread of COVID-19, including nationwide workplace vaccine mandates for several categories of employers. Certain federal contractors and subcontractors, for instance, are now required to have all employees fully vaccinated by December 8, according to guidance released by the Safer Federal Workplace Task Force. A similar [federal mandate is soon expected](#) from the Occupational Safety and Health Administration (OSHA), which will publish an Emergency Temporary Standard (ETS) requiring all employers with 100+ employees to impose a workplace vaccine mandate or require weekly testing for unvaccinated employees. The OSHA ETS will reportedly include penalties of \$14,000 per violation, while federal contractors who do not comply with their vaccine mandate may see their contracts cancelled and federal funding cease.

As the Biden Administration continues its vaccination plans, several states are starting to push back. Montana and Texas, for example, have taken steps to prevent employers' enforcement of vaccine mandates in their states. On May 7, 2021, Montana Gov. Greg Gianforte signed Montana House Bill 702, which prohibits discrimination based on vaccination status. This includes a prohibition on any employer or government entity refusing employment to a person based on vaccination status, or discriminating against any person in compensation or in a term, condition, or privilege of employment based on the person's

vaccination status.

Meanwhile, federal mandates will require most employees (e.g., 80 million employees are estimated to be impacted), and all federal contract employees, to be vaccinated, with limited exceptions. Federal law only requires employers to provide qualifying employees with workplace accommodations based on an employee's disability (under the Americans with Disabilities Act) or sincerely-held religious belief (under Title VII) that prevent the employee from receiving the COVID-19 vaccine.

With a seeming conflict between state responses to federal mandates, as well as their respective exemptions, many employers are rightfully wondering what obligations they can mandate for their workforce and what accommodations they must provide to employees.

Federal Preemption

Some employers have already picked a side: a national air carrier, for example, recently announced they will be requiring employee vaccinations, stating that the "the federal vaccine mandate supersedes any conflicting state laws." This sentiment strikes at the key legal question at issue: do federal mandates always supersede state mandates?

The simple answer, in most cases, is "yes" – federal law generally supersedes conflicting state law. Article VI, Paragraph 2 of the U.S. Constitution – the "Supremacy Clause" – generally establishes that federal law is "the supreme law of the land" and takes precedence over state laws and state constitutions. This same federal supremacy has been granted by Congress to federal agencies, who have the power to create regulations, in this case, vaccine mandates, that have the force of federal law. The OSH Act of 1970, for instance, which directed the creation of OSHA, also enabled the agency to write regulations that carry the power of federal law.

Therefore, while state laws may generally be more restrictive than their federal counterparts, they cannot be less restrictive – i.e., states cannot circumvent federal requirements with their own. Indeed, the September guidance for federal contractors directly

states that the federal contractor requirements are “promulgated pursuant to Federal law and supersede any contrary State or local law or ordinance.” Meanwhile, the Pentagon released a [statement](#) on October 14 reiterating that the federal contractor mandate preempts local laws and ordering defense contractors to have their employees vaccinated. Several such contractors, including [Raytheon](#) and [Boeing](#), will reportedly require employee vaccinations.

Likely Challenges

That is not to say, however, that such mandates will go unchallenged. Indeed, on October 22, Arizona’s Attorney General filed an amended lawsuit challenging the federal contractor vaccine mandate, alleging the mandate violates several provisions of the Constitution. And, although OSHA’s ETS has not yet been published, Attorneys General in 24 states have already stated they will immediately file suit to [challenge the enforcement of the ETS](#).

OSHA, in particular, will face an uphill battle to demonstrate that their expected ETS is “necessary” to prevent a “grave danger” to workers – the standard that Section 6(c)(1) of the OSH Act requires any ETS to meet. Certainly, many states and large employers across the country are already preparing arguments and strategies to counteract these mandates.

Next Steps

Although federal vaccine mandates will likely face upcoming legal challenges, employers in any state(s) would be wise to consult with their counsel to consider and prepare for impending federal mandates and deadlines – especially the December 8 deadline for federal contractors. And, while the requirements of the anticipated OSHA ETS [remain unclear](#), employers likely subject to the ETS (100+ employees) can better prepare their workplaces now by getting organized with their counsel, such as by considering necessary new workplace policies and reviewing their employee accommodation obligations.

Meanwhile, employers in states such as Montana and Texas should consult with counsel and proceed cautiously before taking adverse

action against employees opposing workplace vaccine mandates.

Frost Brown Todd will continue to promptly update and advise employers on their obligations as new federal guidance is released.

For questions or additional information, please contact [Catherine Burgett](#), [Fred Gaona](#), [Steve Tolbert](#), or any attorney in Frost Brown Todd's [Labor and Employment Group](#).

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