

ALERT

New Florida Law Limits Private Employer Vaccination Mandates; Creates Headaches for Employers Subject to Federal Requirements

November 19, 2021

What: On November 18, 2021, Florida Governor Ron DeSantis signed Florida HB 1B/SB 2B into law. The law, which took effect immediately, temporarily invalidates all employer policies mandating vaccinations against COVID-19 and prohibits private employers from imposing vaccination mandates on employees unless they allow their employees to apply for and receive certain statutory exemptions from vaccination requirements. The new law was one of four bills Governor DeSantis signed on Thursday, all of which came out of a contentious special legislative session convened in response to the federal government's coronavirus vaccine mandates.

Key Provisions of the Law

The law, which is codified in Section 381.00317 of the Florida Statutes, provides that existing "employer COVID-19 vaccination mandate[s]" are "invalid until the Department of Health files its emergency rules or 15 days after the effective date of this [law], whichever occurs first."

Under the law, private employers "may not impose a COVID-19 vaccination mandate for any full-time, part-time, or contract employee," unless they also allow their employees to apply for an exemption from the vaccination requirement based on: (i) medical reasons, including, but not limited to, pregnancy or anticipated pregnancy; (ii) religious reasons; (iii) COVID-19 immunity; (iv) willingness to submit to periodic testing "at no cost to the employee;" or (v) willingness to use "employer-provided personal protective

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equipment” (i.e., masks or face coverings provided) at no cost to the employee.

Each exemption category sets forth basic qualification standards. For example, “[t]o claim an exemption based on COVID-19 immunity, the employee must present to the employer an exemption statement demonstrating competent medical evidence that the employee has immunity to COVID-19, documented by the results of a valid laboratory test performed on the employee.” It is unclear how much, if any, discretion employers will have concerning whether to grant or deny an exemption request. That said, the law provides for the Florida Department of Legal Affairs (the Office of the Attorney General) to conduct investigations to determine whether exemptions were “improperly applied or denied,” which suggests that there may be instances where an employer is justified in denying a request for an exemption.

The law also outlines the procedures for employees to request exemptions, creates a claim/complaint process for employees who allege violations, and directs the Florida Department of Health to adopt emergency rules regulating the exemptions and create forms for employees to use to seek exemptions.

Potential Penalties

Employers who violate the law are subject to fines of up to \$10,000 per violation if they employ fewer than 100 workers and up to \$50,000 per violation if they employ 100 or more workers. Still, it appears that employers will be afforded opportunities to cure their noncompliance before the imposition of fines.

Practical Impact:

A Tough Spot for Federal Contractors

The Florida law puts federal contractors with operations in the state squarely in the middle of a tug-of-war battle between the state and the Biden administration. The federal contractor vaccination mandate (Executive Order 14042) and the implementing guidance issued by the Safer Federal Workforce Task Force conflicts with Florida’s requirement that companies permit their employees to opt-out of the vaccination requirement if they demonstrate so-called “natural immunity” based on prior COVID-19 infection, agree to wear employer-provided masks or face coverings, or agree to submit to weekly testing. That conflict will likely give rise to legal battles over whether Executive Order 14042 (EO) and its implementing guidance supersede Florida law. The conflict between the state and federal standards also means that employers with workplaces that are subject to the EO may be forced into the unfortunate position of deciding whether to prioritize compliance with the terms of their contracts with the federal government or compliance with Florida law. Given the potential costs of noncompliance with the Florida law, affected contractors need to discuss the best path forward with their counsel, which may include creating the appropriate conditions for future equitable adjustment claims to recoup costs associated with noncompliance with the Florida law from the federal government.

More Confusion for Employers with 100 or More Employees

As we discussed in a recent alert, the Occupational Safety and Health Administration (OSHA) issued an Emergency Temporary Standard (ETS) on November 4, 2021, which required businesses with 100 or more employees to ensure that their workers are either fully vaccinated against COVID-19 or subject to weekly COVID-19 testing. Two days later, the Fifth Circuit entered an order temporarily halting the ETS, as discussed in more detail here. At the time of this writing, the ETS remains temporarily halted pending litigation in the Sixth Circuit Court of Appeals, the site for judicial determination of all of the legal challenges to the ETS based on a November 16, 2021, multi-district litigation lottery. OSHA recently indicated that it is suspending “activities related to the implementation and enforcement of the ETS,” though the Agency expressed confidence that the ETS was lawfully issued in the same statement. That said, the ETS will have to survive scrutiny from a randomly selected panel of judges within the Sixth Circuit, where Republican appointees outnumber Democratic appointees ten to six and where a third of the active judges are Donald Trump appointees.

In the short term, the Sixth Circuit will need to decide whether to lift or modify the Fifth Circuit’s decision to halt the ETS temporarily. It will likely take action on the stay only after briefing from the parties, which will take at least a few days. In the (slightly) longer term, the Sixth Circuit will hear arguments and decide the challenges to the ETS on the merits on what will likely be an expedited briefing schedule. No matter what happens at the Circuit Court of Appeals level, the U.S. Supreme Court is likely to have the final say on the enforceability of the ETS given the significance of the costs associated with employers’ implementation of the ETS (an estimated three billion dollars) and impact on employees, not to mention the potential constitutional issues.

Employers have struggled to understand how to move forward concerning the ETS given the hotly contested legal issues and the fast-approaching December 5, 2021, deadline for compliance with certain portions of the rule. The new Florida law won’t make those considerations any easier. As is the case with the EO, the Florida law conflicts with the ETS by providing exemptions that the ETS does not recognize (e.g., the ETS requires employers to implement policies that make both testing and masking mandatory in lieu of vaccination, while the Florida law appears to permit employees to choose whether they submit to periodic testing or wear masks). If the ETS is ultimately implemented, covered employers may once again be forced to choose between compliance with federal law and compliance with Florida law.

Other Pecuniary Concerns

Even if employers could simultaneously comply with the EO, the ETS, and the Florida law, the Florida legislature’s decision to include a requirement that employers pay for masks and tests creates a financial burden for employers. In particular, the law’s requirement that the periodic testing exemption come “at no cost to the employee” could mean that employers in Florida must implement methods to allow non-exempt employees to record their time and receive compensation for time spent testing.

What Should Florida Employers Do?

Federal contractor employers with workplaces that are covered by the EO are still expected to comply with the mandate and certify that their covered employees who have not received a medical or religious accommodation are fully vaccinated by January 18, 2022.

Meanwhile, although OSHA has suspended the implementation and enforcement of the ETS, risk-averse employers have begun planning to comply with the ETS' deadlines given the possibility that the stay could be overturned before the December 5 deadline to prepare and implement ETS compliant policies and given that it could take weeks to plan and coordinate compliance with the ETS. The good news is that, although there are some conflicts between the ETS and the new Florida law, it appears that employers can potentially establish policies that comply with both sets of requirements.

Now, more than ever, Florida employers need to convene their leadership teams and legal counsel to chart a path forward.

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