How are Businesses to Navigate the Conflicting Federal Vaccine Mandates and State Bans on Such Mandates?

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PROFESSIONALS

John R. Hayes
Partner

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Vaccine Mandates in the Workplace

In the past several months there has been a flurry of Executive Orders and other legally binding rules regarding vaccine mandates. Standing first and above the rest are the Executive Order by the Biden Administration mandating federal contractors have a vaccinated workforce without the option for testing (we previously blogged on this topic on September 13, 2021 and on September 27, 2021), and the imminent Emergency Temporary Standard (ETS) to be issued by the Occupational Safety and Health Administration (OSHA).

In the wake of those federal mandates many states have enacted legislation or Executive Orders in direct response. For example, Texas Governor Greg Abbott issued an Executive Order essentially prohibiting vaccine mandates by private employers. This would seem to directly conflict with the federal contractor Executive Order. On the flip side, Illinois has introduced legislation amending its Health Care Right of Conscience Act to clarify that no action will be allowed under the Act when the refusal to accept treatment involves steps taken to reduce the risk of COVID-19 transmission. So, what are employers to make of all this?

First, employers should analyze the nature of their business, the federal rules that most impact their operations, the state(s) they operate in, along with their tolerance for risk before making any decisions regarding these constantly changing issues. At the same time, 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 CDC and OSHA.

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State Mandate Bans

In addition to the Texas Executive Order essentially banning vaccine mandates, several states are taking, or have taken, similar action. Montana already prohibits employment discrimination based on vaccination status. Ohio is considering legislation that would require employers to accept negative COVID-19 tests if they implement vaccination mandates, and Arkansas recently sent legislation to its governor that will give workers the option to submit to weekly testing or submit proof biannually of natural antibodies from prior infection. Additionally, Iowa's Governor Kim Reynolds recently signed a bill into law that does not ban vaccine mandates, but makes it easier for employees to get exemptions, by simply providing a note—and also providing unemployment benefits to employees who are fired for refusing a vaccine mandate by their employer.

Generally speaking federal rules will preempt state law. However, the new federal rules are not applicable across the board to all private businesses, so their impact on each employer must be reviewed individually. For example, the federal contractor Executive Order only applies to certain employers under specific types of contracts with federal agencies, and the upcoming OSHA ETS will only apply to employers with 100 or more employees. So, employers in states with some type of vaccine mandate ban that are not covered by those federal rules may need to comply with their state's rules.

Even though federal law preempts state law, this does not mean that some states are not gearing up for a fight. The attorneys general of 24 states have already pledged to fight the OSHA rule, and have sent a letter to President Biden stating the 100 employee threshold is arbitrary, that COVID-19 does not present a grave danger to workers and that it is not a true workplace standard. While at this time it seems unlikely these arguments will succeed, they may at the very least be used as a delaying tactic to slow the implementation of the federal rules.

State Laws Bolstering Vaccine Mandates

On the other end of the spectrum from vaccine mandate bans and restrictions, in addition to the Illinois amendment, New York state issued an order requiring health care workers to get vaccinated that did not include an exception for employees with sincerely held religious objections. However, a court temporarily blocked that part of the state's order while litigation ensues.

Moreover, governors and health agency leaders in 19 states require some or all state employees to be vaccinated against COVID-19 or get regularly tested. Twenty-one states also have some type of requirement for vaccinations of health care workers. For the most part these mandates align with the federal rules, and likely will not raise preemption questions.

Conflict with State OSHA Plans

Another issue is that many states have their own occupational safety plans and the federal rules could clash with anti-mandate laws in those states that have their own plans, which are partly funded by OSHA. Twenty-one states run their own plans, which must include workplace protections that are at least as stringent as federal rules for state, local government and private-sector workers.

For example, under Indiana law, state agencies cannot require employees to provide written or electronic proof of COVID-19 vaccination. That conflicts with the upcoming federal OSHA ETS, which will require that employers track and maintain records of employee vaccination status.

While it remains to be seen exactly how this will play out, at least until the OSHA ETS is issued, it is possible that these states with their own safety plans will face lawsuits and also the possibility of the federal OSHA taking over the state-run agencies/plans. These states may also file their own litigation against OSHA and the federal government contesting the OSHA rule.

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What this Means for Businesses

So what are employers to make out of all these dizzying mandates, laws and rules they are being bombarded with? Initially, it is important to note that the proposed OSHA rule on large employers will not force them to ensure that their workers are immunized, rather it will allow for weekly COVID-19 testing as an alternative to vaccination. Thus, an employer could comply with both a state ban and federal law by, for instance, requiring all workers to get regularly tested for COVID-19. A rule therefore won't automatically or necessarily preempt state vaccination bans, but will require a case-by-case analysis by the employer regarding its policies.

Moreover, it should be noted that any choices employers make about their policies should be well-documented and supported with appropriate employee communications and training.

Employers will have to remain vigilant and likely 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. Employers should therefore look to confer with their legal counsel regarding any potential conflicts. Ideally, this discussion should occur as soon as possible once the OSHA ETS is issued given the potential for violations with conflicting rules.