

**BLOGS**

COVID-19;Workplace Policies

# Competing Executive Orders: The Status and Validity of Texas’s Vaccine Mandate Ban

In the wake of President Biden’s issuance of executive orders requiring that certain employers in the country require COVID-19 vaccinations, some states, like Texas, are taking action to try to block these mandates. This raises the question of whether a state or local government can override federal vaccine requirements.

## Federal Vaccine Mandates

On September 9, 2021, President Biden issued executive orders mandating COVID-19 vaccinations for federal employees, employees of certain health care entities, and certain employees of federal contractors and subcontractors. President Biden also issued an executive order directing the Occupational Safety and Health Administration to issue an upcoming Emergency Temporary Standard (“ETS”) requiring private employers with more than 100 employees to require employees to be vaccinated or submit to weekly routine COVID-19 testing.

On October 1, the U.S. Office of Personnel Management issued a memo to heads of executive departments and agencies providing deadlines for full vaccination for federal employees.<sup>[1]</sup> The deadline for federal employees to be fully vaccinated is November 22, 2021. The deadline for covered federal contractors to have their covered employees be fully vaccinated is December 8, 2021, although a later date might apply based on the details of a contractor’s covered contract OSHA recently sent its proposed ETS to the White House Office of Management and Budget (“OMB”) for review and approval, meaning that the ETS is likely to be issued in the near future.

## Texas Governor’s Executive Order

On October 11, 2021, Texas Governor Greg Abbott issued an executive order “prohibiting vaccine mandates, subject to legislative action” (“EO-40”). The order states:<sup>[2]</sup>

“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 purported penalty for a violation of this order is a fine up to \$1,000.

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Governor Abbott also added the issue of vaccine mandates to the agenda of the then current legislative session via EO-40. However, the Texas Legislature ended its third Special Session this week without passing a bill that would purport to prohibit employers in the state from mandating vaccination against COVID-19. Two proposed bills were generally voted down, fueled by objections that the bill was anti-business.

## Impact of the Texas Executive Order

The Texas Governor's EO-40 directly conflicts with Biden's executive orders. Accordingly, it will likely be quickly challenged in court on federal preemption grounds. The supremacy clause of the U.S. Constitution prohibits states like Texas from interfering with valid federal laws. In addition, the federal vaccine orders and related guidance contain language making clear that the intention is for federal preemption to apply. Accordingly, if the federal vaccine mandates are upheld as valid law, there is strong reason to believe that EO-40 will be unenforceable as a matter of law.

Another question about EO-40 is whether the Texas government would actually seek to enforce the order. As evidenced by the Texas Legislature, the ban is not particularly popular even within the largely Republican state legislature because of its anti-business implications. Therefore, there is some doubt that the state government would be willing to enforce the very same ban they just recently refused to impose on Texas employers. A similar issue is playing out with Governor Abbott's order banning mask mandates in public schools, which has been met with several school districts openly flouting the order with some success.

University of Texas Law professor Randall Erben has also highlighted a third issue with EO-40 that relates to the actual wording of the ban.<sup>[3]</sup> According to Erben, EO-40 doesn't stop businesses from mandating vaccines at all, but rather bans entities from "compelling" someone to get inoculated. Erben believes that the ban empowers the individual applicant or employee not to be compelled—that is, the employer can't make them get a vaccination. However, Erben does not believe that EO-40 prohibits an employer from declining to hire or from firing an unvaccinated individual. If interpreted this way, EO-40 may be toothless to the extent it does not prevent employers from punishing employees who do not comply with their mandate.

Governor Abbott's EO-40 is rife with with constitutionality, political, and even textual issues that have created uncertainty for employers. As a result, employers should closely monitor whether Abbott reconsiders his order or its enforcement and, if he does not, litigation over the order within the Courts. However, for the time being, given the issues with EO-40, employers who are subject to the President's federal employee and federal contractor mandate should continue to adhere to those orders.

Indeed, a number of federal contractors and other large employers are moving forward with implementing the federal vaccine mandate. For example, despite the conflicting Texas and federal orders, air carriers such as Southwest Airlines and American Airlines, which are federal contractors subject to Biden's executive order, have expressed their intent to comply with the President's vaccine mandate.<sup>[4]</sup> Similarly, Houston Methodist, one of the first hospital systems in the country to require COVID-10 vaccinations for employees, has stated that it does not plan to reinstate employees who were terminated for failing to comply with their vaccination mandate and expects all new employees to get vaccinated going forward.

## Additional Considerations for Employers with 100+\_Employees:

The conflicting federal and Texas orders have also created an area of uncertainty due to sections of the orders that are not yet in conflict. While Governor Abbott's EO-40 is in effect, OSHA's ETS has not yet been issued and is not yet effective. As such, employers with Texas employees may want to consult with counsel about whether to move forward with compliance with the anticipated ETS or wait until it is effective.<sup>[5]</sup>

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[1] [https://chcoc.gov/sites/default/files/Director-Memo-on-Enforcement-of-Vaccine-Requirements\\_0.pdf](https://chcoc.gov/sites/default/files/Director-Memo-on-Enforcement-of-Vaccine-Requirements_0.pdf)

[2] [https://gov.texas.gov/uploads/files/press/EO-GA-40\\_prohibiting\\_vaccine\\_mandates\\_legislative\\_action\\_IMAGE\\_10-11-2021.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-40_prohibiting_vaccine_mandates_legislative_action_IMAGE_10-11-2021.pdf)

[3] <https://www.chron.com/politics/article/Texas-Houston-Greg-Abbott-vaccine-mandate-ban-16533743.php>

[4] <https://www.reuters.com/business/aerospace-defense/southwest-airlines-comply-with-biden-vaccine-mandate-by-dec-8-2021-10-04/>

[5] <https://www.reginfo.gov/public/do/eoDetails?rrid=200866>