



VACCINE OR TEST MANDATE

**FREEDOM
PATH307**

BACKGROUND

After Covid-19 vaccines became widely available, many businesses around the country were pressured to adopt vaccine mandates for their employees that required them to take the vaccine unless they could not for medical reasons. Although the U.S. Supreme Court recently ruled that the federal government could not force businesses to implement vaccine mandates, courts have generally ruled that businesses have the legal authority to adopt vaccine mandates for their employees.

There has been significant pushback in the last few months in several states that have argued businesses should not be able to force their employees to take the Covid-19 vaccine. This has led to varying rules across different states which presents problems for companies that have employees in several different states. Certain exemptions, such as a previous Covid-19 case, are only permitted in some states forcing businesses to implement different rules for their employees in different states.

ISSUE ANALYSIS

In 2021, several states passed legislation designed to prevent businesses from implementing Covid-19 vaccine mandates on their employees. The Wyoming Legislature will likely consider legislation during its 2022 legislative session limiting the ability of businesses in Wyoming to implement vaccine mandates on their employees. It is imperative that Wyoming businesses are provided flexibility that allows their employees to opt out of these mandates. Other states have created expanded medical and religious exemptions that are required to be accepted by employers, while not forcing them to choose which exemptions to implement. In addition, some states have provided options such as reinstating employees if they are faced with complaints over terminating them for being unvaccinated. terminating them for being unvaccinated.

For example, Governor DeSantis and Florida lawmakers passed legislation that prevents businesses from implementing a Covid-19 vaccine mandate on their employees unless they allow several exemptions to be accepted. This legislation is an excellent starting point for Wyoming legislators to consider.



RECOMMENDATION


Legislation modeled on Florida's bill only allowing vaccine mandates if they permit several exemptions for their employees can be easily replicated in Wyoming. The legislation provides wide latitude to employees for claiming exemptions. Companies can avoid being forced to choose which exemptions to grant from their employees due to the legislation and are protected from lawsuits from employees terminated for being unvaccinated.

Employers also can easily avoid fines through reinstating the employee with back pay if they do not want to risk a fine from the Attorney General.

Additional flexibility can be found in a law passed in Arkansas, in which employees are allowed to provide proof of immunity by taking an antibody test or providing results of a prior positive Covid test result.

Legislators should consider allowing additional exemptions to vaccine mandates depending on the needs of the workplace, such as allowing employees to work remotely. Employers should also be able to use PPE measures or periodic testing requirements for employees.

Finally, while actions taken in Texas have been beneficial to the state, it is preferable to pursue legislative action rather than executive orders. In Wyoming, like most states, the authority of the governor to change policy through executive orders is limited.



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STATE RESPONSES TO THE FEDERAL MANDATE

Florida

In November 2021, Gov. DeSantis Signed Legislation Preventing Businesses In Florida From Implementing Vaccine Mandates Unless They Allowed Workers To Opt Out For Several Reasons

On November 18, 2021, Gov. Ron DeSantis (R-FL) Signed New Legislation Preventing Businesses From Having Vaccine Mandates Unless They Allow Workers To Opt Out For Medical Reasons, Religious Beliefs, Immunity From A Previous Covid Infection, Regular Testing, Or Agreeing To Wear Protective Gear. “Private businesses in Florida will be forced to let workers opt out of coronavirus vaccine mandates after Gov. Ron DeSantis signed a sweeping legislative package Thursday to combat White House virus rules... The new law prevents businesses from having vaccine mandates unless they allow workers to opt out for medical reasons, religious beliefs, immunity based on a previous infection, regular testing or an agreement to wear protective gear.”

(Anthony Izaguirre, “Florida Gov. DeSantis Signs Bill Limiting Vaccine Mandates,” The Associated Press, 11/18/21)

- **The Bill Includes Fines For Businesses That Fire Workers Without Allowing The Exemptions And Also Prevents Schools And Governments From Having Vaccine Mandates.** “The bill also includes fines for businesses that fire a worker without allowing the exemptions. Additionally, it bars schools and governments from having vaccine mandates and allows parents to sue schools with masking requirements.”

(Anthony Izaguirre, “Florida Gov. DeSantis Signs Bill Limiting Vaccine Mandates,” The Associated Press, 11/18/21)

- **The National Law Review: “Employers Found To Have Violated The Statute May Be Subject To Fines Of Up To \$10,000 Per Violation For Employers With Fewer Than 100 Employees, And Up To \$50,000 Per Violation For Larger Employers.** “Employers found to have violated the statute may be subject to fines of up to \$10,000 per violation for employers with fewer than 100 employees, and up to \$50,000 per violation for larger employers. Such fines can be avoided if, prior to the attorney general issuing a final order, the employer reinstates the employee with full back pay. In addition, individuals who are discharged or denied employment based on an employer’s failure to recognize an authorized exemption cannot be denied unemployment benefits if otherwise entitled. The law does not provide an employee with a private right of action against the employer.”

(“List of States Limiting Employer COVID-19 Vaccine Mandates Continues to Expand,” The National Law Review, 11/18/21)



Strengths

Employers In Florida Must Allow Their Employees To Opt Out Of A Vaccine Mandate If They Fill Out A Completed "Exemption Statement" And Also Can Avoid Fines By Reinstating Terminated Employees And Issuing Them Back Pay If They Face A Complaint

Employers Must Allow Their Employees To Opt Out Of A Vaccine Mandate If They Fill Out A Completed "Exemption Statement." "To effect such an opt-out, an employee need only provide the employer with a completed 'exemption statement.' The law details what, in most instances, needs to be included in such a statement to obtain the exemption requested. The law expressly states employers must allow an employee to opt out – not simply consider a request to opt out."
(Nancy Johnson, "New Florida Law Governs Employer Vaccine Mandates," [Littler](#), 11/18/21)

Employers Can Avoid Fines By Reinstating Employees And Giving Them Back Pay Prior To The Issuance Of A Fine By The Attorney General. "However, the Attorney General may not impose a fine on an employer that reinstates, prior to the issuance of a final order, a terminated employee with back pay to the date that the complaint was received by the department under this subsection."
(HB 1B, [Florida House of Representatives](#), Passed 11/19/21)

The Florida Bill Requires Medical Exemptions Claimed By Employees To Be Signed By A Medical Professional Unlike A Vaccine Mandate Exemption Bill In Iowa

The Florida Legislation Requires An Exemption Statement Signed By A Medical Professional Saying That The Covid Vaccine Is Not In The Medical Interest Of The Employee. "To claim an exemption based on a medical reason, the employee must present to the employer an exemption statement, dated and signed by a physician, physician assistant, or advanced practice registered nurse certifying in their professional opinion the Covid-19 vaccination is not in the best medical interest of the employee."
(Nancy Johnson, "New Florida Law Governs Employer Vaccine Mandates," [Littler](#), 11/18/21)

- **A Vaccine Mandate Exemption Bill In Iowa Permits Medical Exemptions For Employees Without Providing Supporting Medical Documentation.** "First, some expand the availability of medical and religious exemptions to workplace vaccine requirements. Iowa is an example. Under the new Iowa statute, employees are entitled to a medical exemption without providing supporting medical documentation. Instead, the law requires only a 'statement that receiving the vaccine would be injurious to the health and well-being of the employee' to qualify for the exemption."
(Kaitlynn Milvert, "The OSHA Vaccine Mandate: A Roundup Of State Responses," Harvard Law Petrie-Flom Center's [Bill Of Health Blog](#), 11/23/21)

Room For Improvement

The Legislation Only Mentions Five Specific Exemptions And Does Not Require Employees To Be Truthful In Their Exemption Statements

The Legislation Only Mentions Five Specific Exemptions To A Vaccine Mandate, But Does Not Mention Other Potential Exemptions, Such As Working Remotely. “A private employer may not impose a Covid-19 vaccination mandate for any full-time, part-time, or contract employee without providing individual exemptions that allow an employee to opt out of such requirement on the basis of medical reasons, including, but not limited to, pregnancy or anticipated pregnancy; religious reasons; Covid-19 immunity; periodic testing; and the use of employer-provided personal protective equipment.”

(HB 1B, Florida House of Representatives, Passed 11/19/21)

Employers Must Pay The Costs Of Tests, But The Law Does Not Mention The Difficulty Some Employers May Have In Obtaining Tests. “To claim an exemption based on periodic testing, the employee must present to the employer and exemption statement indicating that the employee agrees to comply with regular testing for the presence of Covid-19 at no cost to the employee.”

(HB 1B, Florida House of Representatives, Passed 11/19/21)

NOTE: *There is nothing in the law that requires employees to be truthful in their exemption statements which deprives employers of the ability to respond to fraudulent exemptions statements.*

Enforcement

According To Foley And Lardner LLP, There Are “Gaps And Conflicts” Between Federal Regulations And The Florida Law. “Although the Emergency Rule and FAQs provide additional guidance to the Florida law, there are still gaps and conflicts between the Florida law and the federal regulations- particularly in light of the recent court rulings on legal challenges to the federal guidance.”

(Foley and Lardner LLP, “Florida Issues Emergency Rule And FAQs Clarifying Its Covid-19 Vaccination Mandate Law,” The National Law Review, 12/27/21)

An Emergency Rule Issued By The Florida Department Of Legal Affairs Established A Complaint And Investigation Process Allowing Any Complainant To File A Complaint With The Department Of Legal Affairs Which Would Investigate Prior To Submitting A Report To The Florida Attorney General’s Office. “The Emergency Rule also establishes an administrative complaint and investigation process. In short, any complainant must file a legally sufficient complaint with the Department of Legal Affairs. The Department of Legal Affairs will then investigate the complaint before submitting an investigative report to the Attorney General’s designee.”

(Foley and Lardner LLP, “Florida Issues Emergency Rule And FAQs Clarifying Its Covid-19 Vaccination Mandate Law,” The National Law Review, 12/27/21)

Supreme Court Ruling

In January 2022, The U.S. Supreme Court Allowed A Limited Federal Covid-19 Vaccine Mandate Requiring Health Care Workers At Facilities Receiving Federal Money To Take Affect While Blocking A Federal Vaccine Mandate On Large Employers

In January 2022, The U.S. Supreme Court Allowed A Limited Federal Mandate Requiring Health Care Workers At Facilities Receiving Federal Money To Be Vaccinated. “But in a modest victory for President Biden, the court allowed a more limited mandate requiring health care workers at facilities receiving federal money to be vaccinated.”

(Adam Liptak, “Supreme Court Blocks Biden’s Virus Mandate For Large Employers,” [The New York Times](#), 1/13/22)

- **The Court Also Ruled That The Biden Administration Could Not Force Large Employers To Implement A Vaccine-Or-Testing Mandate.** “The Supreme Court on Thursday blocked the Biden administration from enforcing a vaccine-or-testing mandate for large employers, dealing a blow to a key element of the White House’s plan to address the pandemic as coronavirus cases resulting from the Omicron variant are on the rise.”

(Adam Liptak, “Supreme Court Blocks Biden’s Virus Mandate For Large Employers,” [The New York Times](#), 1/13/22)

- **Federal Law Generally Displaces Contrary State Or Local Laws And The Supreme Court’s Ruling Implicitly Overrode State Laws Banning Vaccination Requirements At Facilities Participating In The Medicaid And Medicare Programs.** “Still, federal laws ordinarily displace, or ‘pre-empt,’ contrary state and local ones, and in allowing the mandate for health care workers, the Supreme Court at least implicitly ruled that it overrode state laws banning vaccination requirements at facilities participating in the Medicaid and Medicare programs.”

(Audra D. S. Burch and Reed Abelson, “Hospitals Confront The Fallout From Supreme Court Ruling On Vaccine Mandate,” [The New York Times](#), 1/15/22)

- **Gov. DeSantis Has Said Florida Will Not Enforce The Federal Covid-19 Mandate Despite The Supreme Court Lifting An Injunction Against The Mandate In January.** “Florida providers are working toward complying with the federal Covid-19 vaccine mandate – despite Gov. Ron DeSantis’ pledge that the state won’t enforce the regulation. The U.S. Supreme Court lifted injunctions against the mandate Thursday. Immediately afterward, the DeSantis administration said its surveyors would not check for compliance.”

(Danielle Brown, “Florida Governor Won’t Enforce CMS Vaccine Mandate Despite Supreme Court Ruling,” [McKnights](#), 1/19/22)

- **The Florida Health Care Association Said Its Members Would Comply With The CMS Rule Citing The Risk Of Losing Medicaid Or Medicare Funding As Too Large.** “The Florida Health Care said that given that federal law supersedes state law, its members are working toward complying with the CMS rule. The risk of losing Medicaid or Medicare funding is too great for participating providers.”

(Danielle Brown, “Florida Governor Won’t Enforce CMS Vaccine Mandate Despite Supreme Court Ruling,” [McKnights](#), 1/19/22)

Florida Companies

Several Florida Companies Have Adjusted Their Vaccine Mandates As A Result Of The Florida Law

The Walt Disney Company Suspended Its National Vaccine Mandate For Florida While Keeping Its Requirement For Its California Workers. “The Walt Disney Company suspended its national vaccine mandate for Florida employees because of state regulations, even as it is working to keep the requirement in place for workers in its home state of California.”

(Emma Goldberg and Lauren Hirsch, “How Businesses In Texas And Florida Wrestle With States’ Vaccine Backlash,” [The New York Times](#), 1/31/22)

The Related Companies, A Real Estate Firm That Previously Mandated Vaccines For Its Staff, Is No Longer Requiring Them For Its Staff In Florida Or Other States Where Vaccine Mandates Are Prohibited. “The Related Companies, a real estate firm that mandated vaccines for all of its employees in April, is no longer requiring them of its staff in Florida or any states where broad vaccine mandates are prohibited.”

(Emma Goldberg and Lauren Hirsch, “How Businesses In Texas And Florida Wrestle With States’ Vaccine Backlash,” [The New York Times](#), 1/31/22)

The Human Resources Technology Company Checkr Has Yet To Make A Decision About Vaccination Policies For Its Florida Office Citing Uncertainty About Regulations In The State. “Checkr, a human resources technology company that is opening a new office in Orlando, Fla, this spring, created a task force that monitors state regulations to set Covid safety policies for each of the company’s five U.S. locations and 845 employees... The company says it has yet to make a decision about vaccination or masking policies for the Florida office, citing uncertainty about the state’s regulations.”

(Emma Goldberg and Lauren Hirsch, “How Businesses In Texas And Florida Wrestle With States’ Vaccine Backlash,” [The New York Times](#), 1/31/22)

Other States

At Least Ten States Have Enacted Laws That Try To Either Limit Employers’ Abilities To Impose Vaccine Requirements Or Expand Exemptions For Individual Employees. “State opposition, however, has not come solely through litigation. In the wake of the OSHA requirements, state legislatures have been highly active in developing legislation that attempts to shield employees from workplace vaccine requirements. Recently, at least 10 states have enacted new state statutes that try to either limit employers’ abilities to impose vaccine requirements or expand exemptions for individual employees.”

(Kaitlynn Milvert, “The OSHA Vaccine Mandate: A Roundup Of State Responses,” Harvard Law Petrie-Flom Center’s [Bill Of Health Blog](#), 11/23/21)

Utah

A New Utah Law Creates Exemptions For Employees Who Claim The Mandate Would “Conflict With A Sincerely Held Personal Belief Of The Employee.” “Second, some state legislatures have created new types of exemptions, such as those based on ‘personal belief.’ Utah has taken this approach. Separate from its religious exemption to vaccine requirements, Utah S.B. 2004 authorizes employees to claim an exemption where vaccination would ‘conflict with a sincerely held personal belief of the employee.’”

(Kaitlynn Milvert, “The OSHA Vaccine Mandate: A Roundup Of State Responses,” Harvard Law Petrie-Flom Center’s [Bill Of Health Blog](#), 11/23/21)

Arkansas

Arkansas Has Enacted A Law Allowing Employees To Provide “Proof Of Immunity,” In Lieu Of Vaccination. “Third, a couple of states have carved out exceptions for employees with previous exposure to COVID-19. Arkansas, for example, allows for employees to provide ‘proof of immunity,’ in lieu of vaccination, by taking an antibody test or providing the results of a prior positive COVID-19 test.”

(Kaitlynn Milvert, “The OSHA Vaccine Mandate: A Roundup Of State Responses,” Harvard Law Petrie-Flom Center’s [Bill Of Health Blog](#), 11/23/21)

Texas

Gov. Greg Abbott (R-TX) Issued An Executive Order That Prohibits Entities - Including Private Employers - From Compelling Any Individual To Take The Vaccine If The Person Cites A Medical, Religious, Or Any Other Personal Reason For Exemption. “Texas businesses received a letter from the Texas Workforce Commission on Wednesday reminding them of the governor’s executive order restricting their ability to mandate vaccines for workers. The letter also urges workers to report their employers to a newly created hotline and email address if they are subjected to a vaccine mandate at work that would violate the executive order. Verified tips will be passed along to ‘the appropriate authorities for prosecution,’ the letter states. ‘Since day one, the state of Texas has taken a stand against the federal government’s unconstitutional COVID-19 vaccine mandates in the workplace, three of which have since been deemed illegal by federal courts,’ Gov. Greg Abbott said in a statement. The governor’s order failed to be codified as law in the last legislative session, but the order is still in effect. The order says no entity in Texas – including private employers – can compel any individual to take the COVID-19 vaccine if the person cites a medical, religious or any other personal reason for exemption. The order carries a \$1,000 fine.”

(Dom DiFurio, “Texas Governor Urges Workers To Report Employers ‘Illegally’ Mandating Vaccines For Prosecution,” [The Dallas Morning News](#), 12/9/21)

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- **NOTE:** *The governor’s order failed to be codified as law in the last legislative session, but the order is still in effect.*

In Texas, Executive Orders Issued By The Governor Changing Government Policy Are Constrained. “It would simplify things for the governor of Texas if he could simply issue executive orders the way a president can... But in a state where the top executive order has constitutionally limited powers, bossing agencies around on policy is constrained.”

(Ross Ramsey, “Analysis: A Governor’s Executive Order Doesn’t Go Very Far In Texas,” [Texas Tribune](#), 6/2/17)

Extended Unemployment Benefits

State Legislatures In Arkansas, Florida, Iowa, Kansas, And Tennessee Have Extended Unemployment Benefits For Workers Who Lost Their Jobs Due To The Vaccine Mandate. “At least five Republican-led states have extended unemployment benefits to people who’ve lost jobs over vaccine mandates – and a smattering of others may soon follow. Workers who quit or are fired for cause – under which defying company policy would qualify – are generally ineligible for jobless benefits. But Arkansas, Florida, Iowa, Kansas and Tennessee have carved out exceptions for those who won’t submit to the multi-shot coronavirus vaccine regimens that many businesses now require. Similar ideas have been floated in Wyoming, Wisconsin and Missouri.”

(Aaron Gregg, “At Least 5 GOP-Led States Offer Jobless Benefits To Workers Who Refuse Vaccines; Others May Follow,” [The Washington Post](#), 12/27/21)

- **In Kansas, The Law Creates A Process Through Which The Government Reviews Claims From Those Who Leave Jobs Because Of A Vaccine Mandate And Can Provide For Retroactive Payment Of Benefits.** “In Kansas, Democratic Gov. Laura Kelly ‘compromised’ with a predominantly conservative legislature to exempt employees from vaccine mandates on medical or religious grounds. The law creates a process through which the government reviews claims from those who leave jobs because of a vaccine mandate and can provide for retroactive payment of benefits. The Kansas law imposes fees of up to \$50,000 per violation for large employers or \$10,000 for smaller ones.”
(Aaron Gregg, “At Least 5 GOP-Led States Offer Jobless Benefits To Workers Who Refuse Vaccines; Others May Follow,” [The Washington Post](#), 12/27/21)
 - **NOTE:** *The Kansas Chamber of Commerce objected to the benefits language.*