Thursday, October 14, 2021

As you undoubtedly know, there has been an enormous amount of media attention given to the recent efforts by the Governor of Texas to prohibit COVID vaccine mandates in Texas.

**Federal Executive Orders**

The public debate began on September 9, when President Biden issued Executive Orders requiring all federal employees and contractors to be vaccinated against COVID-19. The employees and contractors have until Dec. 7 to be fully vaccinated. President Biden also announced that workplace safety regulations would be promulgated to require workforce vaccination in companies with 100 or more
employees.

**Texas Executive Order**

On October 11, [Governor Greg Abbott](https://www.gregAbbott.gov) issued Executive Order No. [GA-40](https://www.gregAbbott.gov) relating to prohibiting vaccine mandates, subject to legislative action. Simultaneously, Gov. Abbott added the issue of prohibiting vaccine mandates to the 3rd Called Special Session of the Texas Legislature, which will adjourn on October 20, 2021 (see explanation below).

In the order, Abbott cited Chapter 161 of the Texas Health and Safety Code, which allows Texas students an exemption from immunization for reasons of conscience, including a religious belief. Other laws including Chapters 38 and 51 of the Texas Education Code, provide for process and procedures for claiming such exemptions for otherwise required vaccines such as meningitis, diphtheria, rubeola, rubella, mumps, tetanus, and poliomyelitis.

Further, Attorney General Opinion No. [KP-0359](https://ag.texas.gov) issued on March 5, 2021, asks whether the Education Code allows school districts, during an epidemic, to exclude students who decline vaccinations for reasons of conscience even when such vaccinations are unrelated to the epidemic (RQ-0364-KP). The opinion highlights Article I, § 6 of the Texas Constitution which states, “No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship…” and subsequently rejects the notion a district may mandate vaccines.

The statewide order states “[n]o 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.” In his order, Abbott suspended all relevant statutes to the extent necessary to enforce this prohibition. The order will remain in effect until the passage of legislation addressing this issue. The order also prescribes a maximum statutory fine that may not exceed $1,000 but also excludes the possibility of confinement in jail.

The order carries the power to supersede any conflicting order issued by local officials in response to the COVID-19 disaster. Several cities and school districts have adopted policies in conflict with prior executive orders of the Governor. All have faced legal action brought by Attorney General Ken Paxton to enforce the Governor’s orders.

**Texas Legislation**

The Regular Session of the Texas Legislature adjourned *sine die* in May and, as mandated in the State Constitution, the State House and Senate were not scheduled to meet again until January 2023. However, the Constitution also authorizes the Governor to call any number of Special Sessions during the legislative interim, 30 days in length, and to determine the agenda for those sessions by a “Call.” Governor Abbott has taken advantage of this authorization to call the Legislature back into
Several bills had been pre-filed in the Texas Legislature when Governor Abbott added the prohibition of vaccine mandates to his Call for the Third Special Session. One of those bills, HB 155, was selected to move forward and had its initial committee hearing on October 13. From the early committee discussion it appears likely that the bill will be amended in significant ways before coming to a vote. However, there is also every indication that some version of the bill will either be passed in the next week before the special session ends, or will be the subject of a fourth call.

The heart of the bill, which we expect will be present in any final version, is the intent to require any COVID vaccine mandate implemented in Texas to include exemptions for: (1) acquired immunity from prior COVID infection, (2) medical conditions, or (3) reasons of conscience, including but not limited to religious grounds. The exemptions must be included in any COVID vaccine mandate applied to employees or customers in Texas. The initial draft of HB 155 applies to all entities in Texas, but there was immediate opposition and testimony from hospitals, health care providers and nursing homes. Since there is an existing Chapter of the Health & Safety Code governing vaccine policies in health care institutions, it is likely they will be carved out of the current bill and continue under their existing statutory provisions.

The draft of the bill as it was introduced did not rely on any governmental enforcement mechanism, but instead created a discrimination cause of action brought by any employee (but apparently not customer). As initially drafted, the employee could sue for injunctive relief, compensatory and punitive damages, attorney fees and costs. This enforcement method has drawn vocal opposition from several groups, including the powerful tort reform group, Texans for Lawsuit Reform. In its initial committee hearing, the bill’s author stated that he would be open to removing the private cause of action and replacing it with some other means of enforcement.

If the private cause of action is included in the final bill, as drafted it only applies to acts after the effective date of the legislation, which is slated for Feb. 1, 2022. This could create a window for employers to take action before February 1st without fear of employee lawsuits.

Other possible means of enforcement the legislators may consider would be the same statute cited in the Governor’s executive order and its $1,000 fine, or the enforcement provision in the prohibition against vaccine passports which simply makes any entity in violation ineligible for state contracts or grants. The latter was mentioned as a possibility during the first committee hearing since this provision would be added right after the vaccine passport ban in the Health & Safety Code.

**OSHA Regulations**

Abbott’s Executive Order may very well face its primary legal challenges as being directly contrary to an [Emergency Temporary Standard](https://www.osha.gov) (ETS) to be issued by the
Department of Labor’s Occupational Safety and Health Administration (OSHA) to implement President Biden’s announcement on September 9 requiring all private employers with one hundred (100) or more employees to ensure that their workers are fully vaccinated against COVID-19 or produce a negative COVID-19 test each week.

The draft ETS, to be contained in OSHA Regulations, has been completed at the agency and is currently being reviewed at the White House. We expect its publication in a matter of days and it will likely require compliance in 15-30 days.

The ETS is likely to provide that the 100 employee threshold will be based on the aggregate number of workers across all sites of a company’s business operations and it is likely that OSHA will avail itself of its existing authority to investigate complaints and conduct workplace inspections to enforce the provisions of the ETS, as well as the issuance of penalties for violations of workplace standards.

Conclusion

The recent developments in Texas have created significant uncertainty in the business community, and it may be some time before there is a final resolution in the courts. Due to the short time remaining in this special legislative session, businesses will need to act quickly to be able to express any concerns before the draft bill becomes final.

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1 Abbott previously issued Executive Orders GA-35, GA-38, and GA-39 to prohibit governmental entities and certain others from imposing COVID-19 vaccine mandates or requiring vaccine passports.

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