

# Employers Advised To Heed Texas Vax Mandate Ban, For Now

By [Katie Buehler](#)

Law360 (October 12, 2021, 9:16 PM EDT) -- Most Texas employers won't have to change their current COVID-19 vaccine policies to comply with Gov. Greg Abbott's new executive order requiring accommodation of religious and medical exemptions to vaccine mandates, even as the policy is expected to be quickly challenged in court.



Texas Gov. Greg Abbott issued an executive order Monday requiring employers to accommodate religious and medical exemptions to vaccine mandates. (AP Photo/Eric Gay)

The two-page executive order, issued Monday, prohibits employers in the state from requiring employees to be inoculated if they object to the vaccine on a religious basis, for medical reasons or for "any reason of personal conscience." The order builds on an Abbott directive from August forbidding state and local government entities from enforcing vaccine mandates.

Abbott's order was issued in response to President Joe Biden's [plans to mandate](#) that businesses with more than 100 employees require workers to either be vaccinated or show a negative COVID-19 test at least weekly.

Employment attorneys told Law360 on Tuesday the majority of businesses operating in

Texas that have vaccine mandates in place shouldn't have to adjust their policies to comply with Abbott's new order, since employers already must accommodate reasonable religious and medical exemptions under the Civil Rights Act and the Americans with Disabilities Act.

But the order does pose a problem for federal contractors in the state that are subject to the Biden administration's requirement that all [federal contractors](#) be fully vaccinated by Dec. 8.

And it introduces a third potential category for exemptions to vaccine mandates: personal conscience, a term not defined in Abbott's order or in Texas statutes.

For now, attorneys told Law360 they are advising clients to comply with Abbott's executive order and wait for clarification from the governor, a formal regulation from the [U.S. Department of Labor's Occupational Safety and Health Administration](#), or a court order.

"Many of my clients are hoping that in the next few weeks there are either court orders that assist them in figuring out what to do or there is some guidance or clarity offered either by the governor's office or by the federal government," said Mike Muskat, a founding partner at labor and employment law firm [Muskat Mahony & Devine LLP](#).

Muskat said he's telling clients to wait for clarification from the governor on the meaning of "personal conscience," noting there is no precedent that would help businesses define the term. He said it could fall in line with conscientious objections parents can make to public school vaccine mandates, but even that term isn't "fleshed out" in Texas law.

At the federal level, OSHA is working on formal regulations relating to vaccine mandates, and attorneys expect that those rules, whenever they are announced, will preempt Abbott's executive order and any law passed by the Legislature. Smaller businesses that fall below the 100-employee federal threshold would be subject to the Texas executive order or potential state statutes, which are expected to be challenged in court.

For businesses that would be subject to the federal rules, a workaround to comply with both Biden's announced plan and Abbott's vaccine mandate ban could be to require weekly testing in lieu of requiring the vaccine, said Paulo McKeeby, a partner at [Reed Smith LLP](#).

Abbott used his order to denounce Biden's "federal overreach" in announcing the vaccine mandate plan. The Republican governor claimed Biden's "bullying" was causing workplace

disruptions that threatened Texas' recovery from the pandemic.

"The COVID-19 vaccine is safe, effective and our best defense against the virus, but should remain voluntary and never forced," Abbott said in a news release accompanying his executive order.

Abbott also teed up the issue for state lawmakers, who are currently meeting in a special legislative session. He added the issue to the special session agenda and asked the Republican-majority Legislature to enact laws to the same effect.

Some businesses may choose to test Abbott's authority and violate the executive order by keeping in place vaccination policies that require all employees to comply or that place employees who request religious and medical exemptions on unpaid leave, [like United Airlines Inc.](#), risking a fine of up to \$1,000 for "any 'failure to comply with'" the order, [Rogge Dunn](#) of the Rogge Dunn Group PC said. But Dunn said most businesses will likely decide to obey the order while it's in place.

Attorneys who spoke with Law360 predicted the executive order would quickly be challenged in court, similarly to how Abbott's statewide ban on mask mandates is [currently being challenged](#). They expect Abbott's authority to issue the executive order and federal preemption to be the crux of the legal battles.

Marlene Williams, partner-in-charge of [Eversheds Sutherland](#)'s Houston office, said she also expected legal challenges to any law passed by the [Texas Legislature](#) at Abbott's request.

"I think we'll definitely see challenges to the order and the eventual law in the coming weeks and months," she said.

Matt Deffebach of [Haynes and Boone LLP](#) said any and all potential challenges to Abbott's order will be previewed at legislative hearings this fall when lawmakers take up the topic, including discussions over their authority to pass such a law and potential definitions for "personal conscience" that will be included.

"I don't think we've heard the last of this executive order," he said.

--Editing by Robert Rudinger.