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## CORONAVIRUS

# Conflicting Vaccine Rules Have Companies 'Pulling Their Hair Out'

Local legal experts weigh in on the conflicting orders and ever-changing regulations.

BY WILL MADDOX | PUBLISHED IN HEALTHCARE BUSINESS | OCTOBER 20, 2021 | 1:00 PM

When Gov. Greg Abbott's executive order last week banned private entities from mandating vaccines for their employees, it created an unenviable dilemma. Companies with over 100 employees or those enforcing vaccination had to figure out if they would abide by President Joe Biden's order that all companies of that size vaccinate or the governor's which required the opposite.

The order and the proposed state legislation that followed (but failed before the special session ended) would allow employees to file a lawsuit against their employer who forced a vaccine upon them. It also conflicts with the



federal order that is mandating vaccinations or frequent testing for large companies. An extensive list of corporate lobbying groups, including the Texas Hotel and Lodging Association, the Texas Medical Association, and Texas REALTORS opposed the legislation. Health systems in Dallas-Fort Worth that have vaccine mandates aren't budging either.

In the meantime, the conflicting rules are making it difficult for corporations. "It's extremely challenging for HR professionals, and they're almost literally pulling their hair out because it seems like every week or two, the law or the purported law, is changing," says Dallas corporate lawyer Rogge Dunn.

For those with federal contracts or those seeking one, the companies risk losing business if they comply with the governor's order. Thankfully for those companies, the Constitution's supremacy clause means that the federal rules are the law of the land when in conflict.

But for employers that have mandated vaccination or provided cash incentives to get vaccinated (some as high as \$500), they are left to navigate a web of conflicting and ever-changing rules and wonder if they need to reverse course. The executive order and legislation allow for an exemption because of "reasons of personal conscience," a phrase that may allow for a good amount of legal ambiguity.

"They want to be intentional and thoughtful, so they haven't immediately changed their policy, but many of them are saying, 'Wait, what does this mean for me? Do I need to change the policy?'" says Stephanie Gaston, a Houston-based partner and labor and employment lawyer at national law firm Bradley. Right now, it seems they are safe to stick with their vaccine mandate.

Other employers who have been enforcing a vaccine mandate have enacted a hiring freeze to avoid the conflict, Dunn says. For employers with significant turnover or growth, this isn't a sustainable practice. Still, others continue to enforce their vaccine mandate and hope they can fly under the radar and aren't noticed by state authorities.

While the testing and vaccines can be received for free, requiring them means lost time for employees. And if an employee is forced to do something for work (like getting a physical or continuing education), they have to be compensated for their time. Frequent testing would mean a significant amount of time lost, another cost for business owners. Some companies have brought vaccinations or testing to the workplace, but if the nurse were to injure someone or if something could go wrong, the employer could be held liable.

Employers have long required vaccinations, flu shots, or other medical care and have always allowed employees to opt-out if they have a medical or sincerely held medical reason not to do so. While those claims were rarely investigated, the number of opt-outs of the COVID-19 vaccine means



companies and their legal teams have to verify if beliefs are sincerely held. Abbott's order has only complicated that process.

After more than a year and a half of the pandemic, uncertainty has been normalized, but that doesn't mean it isn't taking its toll. "You can have a bad law that companies disagree with, but it's easier to deal with a law you don't like that you understand than uncertainty," Dunn says. "With all the legal challenges going on, one day you implement a policy and then three days later, or three weeks later, a court overrules that, and then you're back to square one. A week later, it may change again."

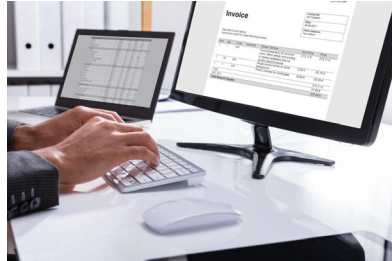
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**NealK** • 17 hours ago

What conflict? This isn't a hard question. The only hard part is dealing with the tiny, hysterical minority anti-vaxx employees and customers.

For any company or HR manager confused about whether a federal mandate or Abbot's "prohibition" on mandates takes precedence over the other, this is the answer:

"the Constitution's supremacy clause means that the federal rules are the law of the land when in conflict."

In any case, Abbott's order is fake. It is toothless performance art and nothing more. People need to actually read the text of the order to see what it really says. Abbott calls it an order "prohibiting vaccine mandates", and everyone - friend, foe and confused bystanders - accepted that framing exactly as Abbott hoped they would.

But the order simply says that "no entity in Texas can compel receipt of a COVID-19 vaccine by any individual, including and employee or consumer, who objects to such vaccination for any reason of personal conscience [etc]". That's it. "Compel" is trying to do a lot of work here, but if a restaurant is turning away customers who don't show vaccine cards, there is no good argument that those customers are being "compelled" to get a vaccine. As for employers, if the owner of Sally's Cookie Shop told her employees that they had to show her their vaccine cards by Friday October 29, and then she fired those that didn't, that business would not be in violation of Abbott's order. Where does "compel" fit into that scenario? It doesn't, because there is no prohibition in the order against an employer firing an employee for refusing to show proof of vaccination. And there is no prohibition in the order on requiring employees or customers to reveal their vaccine status as a condition of employment or entry into a business.

Abbott knows all this, while at the same time lapping up the praise from Fox News. That's why it's performance art.

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**JamieT** • 13 hours ago

The absent federal vaccine mandate is likely leading the confusion.

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