

The COVID-19 Conundrum

How to Navigate the Competing Federal and Florida COVID-19 Vaccine Laws

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Executive Summary:

“Damned if you do, damned if you don’t.” This is how many Florida private employers feel right now given the conflicting federal regulations and Florida’s proposed legislation concerning COVID-19 vaccine mandates. The feeling is understandable considering the federal government recently issued a new rule requiring private employers with 100 or more employees to implement COVID-19 vaccine mandates for their employees. Less than one week later, Florida proposed legislation (the “Proposed Law”) prohibiting employers from implementing mandatory vaccine policies. If Florida’s Proposed Law passes, it will be directly at odds with the federal regulations. This article will walk employers through how to handle this COVID-19 catch 22.

The Biden Administration Issues Vaccine Mandate for Private Employers

On November 4, 2021, the Department of Labor’s Occupational Safety and Health Administration issued an Emergency Temporary Standard (“ETS”) requiring all employers with 100 or more employees to implement a mandatory vaccine policy. Covered employers are required to comply with the majority of the requirements by December 5, 2021, and the testing requirements by January 4, 2022. More than two dozen states, including Florida, as well as a number of businesses, industry groups, and religious organizations, have sued to block the ETS calling it an abuse of government power. This issue is expected to eventually be decided by the U.S. Supreme Court. While the enforceability of the ETS is still up in the air, employers should not sit back and rely on court intervention. Employers need to begin preparing to comply with the December 5 and January 4 deadlines.

Governor DeSantis Counters and Proposes Legislation Limiting Vaccine Mandates

On October 21, 2021, Florida Governor Ron DeSantis called on the Florida Legislature to pass a law combatting federal vaccine mandates and requested a special legislative session rather than waiting until the normal legislative sessions resume next year. On November 8, 2021, the Florida Legislature proposed the measure (SB 2B/HB 1B – the “Proposed Law”) to be decided at the special legislative session the week of November 15, 2021. In essence, the Proposed Law would prohibit private employers from imposing COVID-19 vaccination for certain employees, require employers to exempt certain employees from vaccination, provide a complaint mechanism for employees terminated for refusing to comply with a vaccine mandate, and impose required fines for any employer who violates the law. It is worth noting that the Proposed Law does not contain some of Governor DeSantis’s more extreme demands, such as holding

employers liable for adverse medical reactions to the COVID-19 vaccine if administered as part of a mandatory vaccine program. As of this writing, the Proposed Law is still in the initial phases of the legislative process and still needs to be voted on and signed by Governor Desantis (which should not be an issue) before it is signed into Florida law.

Federal ETS Regulations v. Florida's Proposed Law

The ETS establishes minimum vaccination, vaccination verification, face covering, and testing requirements to address the grave danger of COVID-19 in the workplace. The ETS provides as follows:

- Requires employers to establish, implement, and enforce a written mandatory vaccination policy.
- Employers can choose to provide employees the option of weekly testing. Employers are not required to offer this option or pay for the cost of testing if they do offer it.
- Only applies to private employers with 100 or more employees.
- Does not apply to employees who do not report to a workplace where other individuals, such as co-workers or customers are present; who work only from home; or who work exclusively outdoors.
- Employers must require employees who are not vaccinated to wear a face-covering when indoors and occupying a vehicle with another person for work purposes with limited exceptions. Employers are not required to pay for the face-coverings or other personal protective equipment (PPE).
- Employers are required to obtain each employee's vaccination status, proof of vaccination (if vaccinated), and maintain records of such, and make them available upon request from the employee, employee's representative, or OSHA.
- Noncompliance will subject employers to fines or other penalties.

If passed, Florida's Proposed Law will prohibit private employers from imposing a COVID-19 vaccine mandate for employees unless certain individual exemptions are made available. Florida's Proposed Law provides as follows:

- Employers cannot impose a COVID-19 mandatory vaccine policy unless the employer provides individual exemptions that allow an employee to opt out of such requirement.
- Employer must allow an employee to opt out for (1) medical reasons (including but not limited to pregnancy); (2) religious reasons; (3) COVID-19 immunity; (4) periodic testing; and (5) PPE.
- In order to opt out for testing or PPE, the employee needs to present to his/her employer an exemption statement indicating the employee agrees to the employer's regular testing or reasonable PPE requirement. Employers are required to pay for periodic testing and/or personal protective equipment.
- Applies to **all** private employers regardless of employee count.

- Contains a complaint mechanism for employees who are improperly denied an exemption from a mandatory vaccine policy or terminated for not obtaining the vaccine.
- Employers cannot implement a policy that prevents an employee from obtaining a vaccine.
- Non-compliance will subject employers to fines and/or other penalties.

Which Law Should Employers Follow?

Unfortunately, this is not a simple answer. The U.S. Constitution declares that federal law is the “supreme law of the land.” As a result, federal law will usually supersede (a.k.a. preempt) state law when the laws directly contradict each other. This is an easy determination when federal law specifically preempts an existing state law; however, that is not the case here considering Florida’s Proposed Law was not even a bill yet when the ETS was issued. In a case where Congress does not preempt a specific state law, if challenged, the courts are tasked with determining whether a state and federal law directly conflict. Another wrinkle is that the DOL – the agency tasked with enforcing federal labor laws including the ETS – instructs employers and employees to follow the law that provides the highest standard of protection to employees. Determining which law offers the “highest standard of protection” to employees will be a divisive question – pitting employee safety in the workplace vs. an employee’s freedom to choose his/her medical treatment. There are steps an employer can take to avoid risk, even in the midst of uncertainty:

1. First focus on compliance with the ETS. The Proposed Law has not yet been enacted into law yet. Employers should not rely on court intervention or the potential passage of the Proposed Law to avoid implementing the necessary compliance measures for the ETS. The ETS compliance dates are rapidly approaching, and employers with over 100 employees need to comply with all requirements except for COVID-19 testing for employees who are not fully vaccinated by December 5, 2021, and the COVID-19 testing requirement by January 4, 2022.
2. Continue to monitor the Proposed Law on a regular basis and be ready to adapt. Employers need to keep tabs on the Proposed Law. If/when the Proposed Law is passed, there will be a short compliance window, and employers need to have as much time as possible to adapt their current policies as necessary.
3. Do everything possible to comply with both laws. Employers must familiarize themselves with the nuances of the two competing laws and do everything possible to comply with both of them. It sounds obvious, but the more of each law the employer can comply with, the less chance there is of being found in noncompliance and subjected to the financial penalties associated with noncompliance. If an employer implements a mandatory vaccine policy, provides unvaccinated employees with the option to undergo regular testing, requires the employee to wear PPE when near others, and the employer pays for the testing, the employer is complying entirely with the ETS and with a majority of the

Proposed Law. This is not a perfect solution as the Proposed Law does require exemptions that would run afoul of the ETS (the COVID-19 immunity and PPE exemptions).

4. Don't apply the ETS to employees who are not covered. An easy way to decrease the risk of non-compliance is to avoid applying the ETS to employees not covered by the rule. For example, if an employee works exclusively from home or outside, there is no need to require him/her to get the vaccine. If an employer insists, then the employer can follow the Proposed Law and make sure to provide the required exemptions.
5. Don't forget to comply with employment discrimination laws. Both the ETS and Proposed Law provide for exceptions from the vaccine requirement for medical or religious reasons. If an employer implements a mandatory vaccine policy, the employer must ensure compliance with the Americans with Disabilities Act Amendment Act of 2008 ("ADAAA"), Title VII of the Civil Rights Act of 1990 ("Title VII"), the Genetic Information Nondiscrimination Act ("GINA"), and Florida Civil Rights Act of 1992 ("FCRA"). An employee's request for an exemption from a mandatory vaccine policy based on disability, pregnancy, or religious reason reasons should be treated the same as any other request for accommodation. The employer must engage in the interactive process with the employee to determine whether there is a reasonable accommodation available that does not impose an undue hardship on the company. Employers can request documentation and additional information to confirm an employee's need for a medical exemption. Employers need to make sure they treat employees in a fair and consistent manner when responding to such requests.

This is an incredibly fluid situation. Unfortunately, there is no perfect formula for employers to follow to comply with both the ETS and Proposed Law. Each employer's situation is different and compliance measures and strategy for the competing laws vary and must be determined on a case-by-case basis.

ⁱ If you have any questions about the Federal ETS or Florida's proposed law, please feel free to contact David Kalteux, (813) 261-7848 or dkalteux@fordharrison.com.