

# Texas Governor Issues Executive Order Significantly Limiting the Ability of Many Employers to Mandate Vaccines

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On October 11, 2021, Governor Greg Abbott issued [Executive Order \(EO\) No. GA-40](#), prohibiting any entity in Texas from requiring any individual, including an employee, to receive a COVID-19 vaccination if that individual objects to the vaccination “for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19.” Violation of EO GA-40 can result in a maximum fine of up to \$1,000 per violation. With the issuance of EO GA-40, Texas joins Montana as the only two states with current orders or laws directly addressing private employers’ rights to mandate vaccination for employees.

The wording of Governor Abbott’s order is ambiguous as to whether it creates three bases for objecting to the vaccination or two. Specifically, it is unclear whether the order prohibits employers from requiring individuals to be vaccinated if those individuals object based on their (1) personal conscience, (2) religious belief, or (3) medical reasons, or whether it prohibits employers from requiring individuals to be vaccinated based on their (1) personal conscience based on a religious belief, or (2) medical reasons. The EO can be read either way. The distinction is critical because the second interpretation would largely track existing requirements under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA), whereas the first interpretation would create a much broader category of exemption and effectively negate employers’ ability to mandate vaccines for their Texas employees.

Governor Abbott’s order comes at a time when many Texas employers are preparing to comply with various aspects of [President Biden’s COVID-19 Action Plan](#), including [vaccine mandates for federal contractors](#) and health care workers at Medicare and Medicaid-participating hospitals and other health care settings and the [forthcoming emergency temporary standard \(ETS\)](#), which the U.S. Occupational Safety and Health Administration (OSHA) is to develop and implement, requiring all employers with more than 100 employees to ensure its employees who report to a worksite are either vaccinated or tested weekly. Indeed, in EO GA-40, Governor Abbott specifically referenced the Biden administration’s “bullying [of] many private entities into imposing COVID-19 vaccine mandates, causing workforce disruptions that threaten Texas’s continued recovery from the COVID-19 disaster.”

Regardless of how Governor Abbott's latest order is interpreted, it is his most expansive order to date. On April 5, 2021, [Governor Abbott signed Executive Order No. GA-35](#), prohibiting government entities and private entities that receive public funds from requiring certain individuals to obtain COVID-19 vaccinations or to provide what has become known as "COVID-19 vaccine passports." For government agencies, these prohibitions extend broadly to "any individual," whereas the prohibitions applicable to private companies receiving public funds are limited to "consumer[s]."

Subsequently, on June 7, 2021, Governor Abbott signed into law legislation that prohibits government entities from requiring individuals to provide evidence of COVID-19 vaccination status and strongly discourages private businesses in Texas from requiring COVID-19 vaccine passports from customers. Importantly, nothing in the prior orders or the new statute prevented private employers in Texas from requiring employees to be vaccinated, whereas EO GA-40 does impose such a prohibition in some circumstances. Moreover, EO GA-40 does not reference the ability of a private employer to deny a requested exemption due to undue hardship or direct threat posed to the employee or others, as may be allowed under Title VII or the ADA, as applicable.

How Governor Abbott's new order will interact with the forthcoming ETS is unclear. Arguably, because the ETS will require covered employers to ensure employees are either vaccinated *or* tested weekly, the ETS will not conflict with EO GA-40. If Governor Abbott decides to also prohibit employers from requiring testing, then the conflict with the ETS would be more clear.

In contrast, EO GA-40 seems to conflict directly with President Biden's executive order requiring the COVID-19 vaccine for federal government contractor workers. Similarly, the forthcoming Centers for Medicare & Medicaid Services emergency regulation requiring vaccination of workers in most health care settings that receive Medicare or Medicaid reimbursements will likely conflict with EO GA-40 as to those health care entities subject to the federal vaccine mandate.

In short, Governor Abbott's order is a significant development, but it leaves many questions unanswered. Future legal challenges and additional guidance from the various government authorities may provide greater clarity.

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