

# PUBLICATION

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## Texas Joins Montana in Banning Private Employer COVID-19 Vaccine Mandates

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On October 11, 2021, Texas Governor Greg Abbott issued Executive Order (EO) GA-40 which bans any entity, including private employers, from requiring the COVID-19 vaccination for employees or customers. Texas now joins Montana as the only two states that ban private employers from requiring the COVID-19 vaccination as a condition of employment. In July 2021, Montana's Governor Greg Gianforte signed House Bill 702, which specifically prohibited an employer from refusing employment to a person, barring a person from employment, or discriminating against a person in compensation or in a term, condition, or privilege of employment based on the person's vaccination status or whether the person has an immunity passport. Texas employers should understand the reasons for the issuance of the executive order, the parameters of EO GA-40, and whether legal challenges should be expected.

### Reasons for Issuance of Executive Order GA-40

In EO GA-40, Governor Abbott recognizes that he had already prohibited governmental entities and certain others from imposing COVID-19 vaccine mandates or requiring vaccine passports. He also signed into law Senate Bill 968, which prohibits a business from requiring a customer to provide any documentation certifying the customer's COVID-19 vaccination. For a detailed discussion into SB 968, see Baker Donelson's prior alert, [Texas Prohibits Businesses and Employers from Requiring Customers to Show Vaccine Passports](#).

Governor Abbott also noted that the Biden Administration is, in his opinion, bullying many private entities into imposing COVID-19 vaccine mandates, causing workforce disruptions that threaten Texas's continued recovery from the COVID-19 disaster. Presumably, Governor Abbott is referring to President Biden's COVID-19 Action Plan 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 their employees who report to a worksite are either vaccinated or tested weekly. For more information on the ETS, see our September 10 [alert](#).

### What is Prohibited Under Executive Order GA-40?

EO GA-40 provides that "no 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." As written, EO GA-40 could allow an individual with any reason of "personal conscience" to object to receiving the vaccine. This is significantly broader than the exemptions currently permitted under Title VII of the Civil Rights Act of 1964 ("based on a religious belief") and the Americans with Disabilities Act ("for medical reasons").

Unlike Montana's HB 702, EO GA-40 does not carve out any exemptions. HB 702 provides that a licensed nursing home, long term facility, or assisted living facility is exempt from complying with HB 702 if such compliance would result in a violation of regulations or guidance issued by the Centers for Medicare and Medicaid Services or the Centers for Disease Control and Prevention.

While there are no specific exemptions laid out in EO GA-40, federal contractors and subcontractors should be aware of President Biden's Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors. On September 24, 2021, and pursuant to the Executive Order, the Safer Federal Workforce Task

Force released Guidance on COVID-19 workplace safety protocols. The Guidance, which we covered in this prior [alert](#), provides FAQs which specifically address whether the Executive Order applies in states seeking to prohibit compliance with any of the workplace safety protocols in the Guidance. The Guidance says it does apply, emphasizing that these federal requirements supersede any contrary state or local law or ordinance.

Violation of EO GA-40 can result in a maximum fine of \$1,000 but no jail time.

### **Anticipated Legal Challenges**

Given EO GA-40's broad prohibition, one could anticipate that legal challenges and additional guidance are forthcoming. The Montana law has already been challenged on the basis that the law interferes with the business's choice in determining how best to provide a safe and healthy environment. The lawsuit claims that the new law violates the Montana Constitution, which guarantees the right to "a clean and healthful environment" and the state's obligation to maintain that environment. Governor Abbott announced that he has added the issue of banning vaccine mandates to the agenda of the next special session of the state's legislature. The order will be rescinded once legislation is passed, Abbott said. As this Executive Order is in its infancy stage of implementation, we will continue to monitor and update if there are any legal challenges brought forth.

If you have any questions on this new executive order, please contact the author or any member of Baker Donelson's [Labor & Employment Practice Group](#) for more information or assistance.