

Florida Legislature Passes New COVID-19 Workplace Laws

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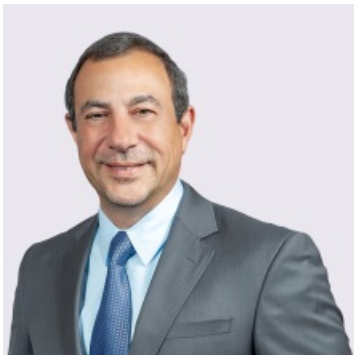
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During a special session to consider what Governor Ron DeSantis called his “Keep Florida Free” agenda, the Florida Legislature passed several vaccine measures, some of which conflict with recently implemented federal rules, that affect the workplace.

Employer Vaccine Mandates, Employee Exemptions

House Bill 1B prohibits private employers from mandating COVID-19 vaccination without providing employees the ability to opt out of the mandate.

Private employers choosing to impose a COVID-19 vaccination mandate must provide the following exemptions:

1. Medical reasons, as determined by a healthcare professional, which include but are not limited to pregnancy or anticipated pregnancy;
2. Religious reasons, because of a sincerely held religious belief;
3. COVID-19 immunity, demonstrated by competent medical evidence that the employee has immunity to COVID-19, documented by the results of a valid laboratory test performed on the employee;
4. If the employee agrees to comply with regular testing for the presence of COVID-19 at no cost to the employee; and
5. If the employee agrees to comply with the employer’s reasonable written requirement to use employer-provided personal protective equipment when in the presence of other employees or other persons.

These exemptions must be submitted to the employer on forms adopted by the Florida Department of Health or on substantially similar forms. To claim an exemption based on medical reasons, the employee must produce documentation from a Florida-licensed healthcare provider (a physician, physician assistant, or advance practice registered nurse) stating that vaccination is not in the best medical interest of the employee. For a religious exemption, the employee must submit a statement declining vaccination because of a sincerely held religious belief and there is no requirement for corroborating documentation.

The law also imposes restrictions on public educational institutions and governmental entities by prohibiting them from requiring COVID-19 vaccination as a condition of employment.

The law allows the state to impose hefty penalties on employers, but does not provide a private right of action for employees.

The new law further specifies that employees improperly terminated on the basis of COVID-19 vaccination mandates may be eligible for unemployment benefits. It also establishes that unemployment benefits may not be denied or discontinued based on a new job offer that would require COVID-19 vaccination.

Florida Occupational Safety and Health State Plan

House Bill 5B requires the Executive Office of the Governor to develop a proposal to withdraw from the federal Occupational Safety and Health Administration (OSHA) and create an OSHA state plan, administered by a state agency some are calling “FLOSHA,” to regulate occupational safety and health at the state level in Florida workplaces, including state and local government. The process to set up a state plan can take two to three years and will allow the state agency to regulate safety and health differently than OSHA, as long as the state regulations are “at least as effective” as OSHA regulations. OSHA itself will have to approve the final plan and adopt it. Twenty-two states currently have their own safety and health agency that regulate private employers. OSHA can revoke state authority if a state agency adopts measures that conflict with or are not “at least as effective” as OSHA’s approach.

Florida Law Conflicts with Federal Rules

The federal government has issued three vaccine-related rules in recent months, including Executive Order 14042 “Ensuring Adequate COVID Safety Protocols for Federal Contractors,” the Centers for Medicare & Medicaid Services’ (CMS) Interim Final Rule (IFR) applicable to Medicare- and Medicaid-certified providers and suppliers, and OSHA’s Emergency Temporary Standard (ETS), all of which conflict to some degree with the new Florida laws.

What Should Florida Employers Do?

Many questions remain unanswered, and largely depend on pending litigation across the country. Employers covered by the Executive Order, CMS IFR, or the OSHA ETS (if it eventually takes effect) will find themselves dealing with conflicting laws. Whether any of the federal measures preempts Florida law will likely end up before the courts. Unfortunately, both state and federal governments have put employers squarely in the crossfire. It is uncertain whether the federal government will challenge the state on these issues or will leave it up to employers to fend for themselves. While these legal issues are sorted out, there are numerous factors for employers to consider in deciding what is right for their operations in the face of this regulatory uncertainty. It is important to monitor the evolving litigation to assess the risks and costs associated with these issues. Florida employers who are not covered by the Executive Order or CMS IFR should immediately consider revising their policies to comply with the new Florida laws.

Florida is not the only state creating a legal quagmire for employers when it comes to vaccine requirements. Other states have also enacted, or are considering enacting, state level legislation regarding COVID-19 mandates.

If you have questions about any of these new rules, or other workplace law developments, please contact the Jackson Lewis attorney with whom you regularly work.

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