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By Chris Marr

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1. Montana, others restrict vaccine mandates
2. Litigation could delay compliance difficulties

President Joe Biden's workplace vaccine mandates set up a conundrum for employers in places where state law limits their ability to require Covid-19 shots for their workers.

Biden, earlier this month, directed the U.S. Labor Department's Occupational Safety and Health Administration to issue an emergency temporary standard requiring businesses with 100 or more employees to ensure their workers get vaccinated or test negative weekly for Covid-19. The administration separately will require most U.S. health-care workers, federal employees, and federal contractors to get vaccinated, the president said on Sept. 9. Taken together, the directives will affect an estimated 100 million workers.

Montana businesses in particular face the challenge of a law enacted this year banning private-sector employers from requiring emergency-authorized vaccines for employees and barring discrimination based on inoculation status. While no other state has gone that far, similar proposals are pending in Ohio and Pennsylvania. Several states have barred state and local government agencies from mandating the shots for their public workforce.

"Montana is certainly on the cutting edge of this issue," said Roger Trim, a Denver labor and employment attorney with Ogletree Deakins Nash Smoak & Stewart P.C. "I foresee there's likely going to be a few states that follow suit. They're just waiting to see how this plays out."

Florida, Missouri, and Texas are notable states to watch, Trim said, given their governors' stated opposition to public health mandates such as vaccination and mask requirements.

Those states haven't yet passed laws banning private-sector employers from mandating vaccines, but their state agencies could find other ways to get tough on businesses that require the shots for their workers such as strictly scrutinizing employers that deny requests for accommodations, he added.

Court Delays Possible

Only days after Biden's announcement, Florida Gov. Ron DeSantis (R) vowed to impose tough enforcement in a Sept. 13 press conference. In this case, the enforcement takes the form of fines for local government entities that violate a state law barring vaccine mandates for public-sector employees, up to \$5,000 per infraction for each employee who's affected.

"Regarding private businesses, we're looking at all legal options to protect the rights of employees," DeSantis spokeswoman Christina Pushaw said by email following the governor's comments.

OSHA is under pressure from the White House to push out its emergency rule in a matter of weeks. Afterward, that rule and Biden's other federal directives are widely expected to face court challenges over their constitutionality as well as OSHA's legal authority for issuing emergency rules in this instance.

"We're a long way from knowing if the OSHA rule is even enforceable," said Lowell Pearson, an attorney with Husch Blackwell LLP in Jefferson City, Mo. Those challenges are likely to result in an injunction or temporary restraining order that will spare employers from having to figure out how to comply, at least for several months. "The risk to employers is going to be abated for a while," he said.

Republican governors and state attorneys general around the U.S. have also promised to fight Biden's vaccine plan as an overreach of his executive power. Arizona Attorney General Mark Brnovich was the first to make good on that vow, filing a federal lawsuit Sept. 14, though he's since conceded in an interview that his suit is a long shot, partly because OSHA hasn't issued the rule yet.

Arizona too passed a law this year barring local and state government agencies from requiring vaccines for their employees.

'Pick Their Poison'

Employers who go to court to tackle the state-federal conflict head on will likely find courts side with those who followed the federal OSHA orders, said Philip A. Toomey, a Los Angeles attorney who chairs the employment and labor practice at Leech Tishman Fuscaldo & Lampl LLC.

"If the employer has to pick their poison, so to speak, they're going to have to comply with fed OSHA and risk violation of the state-specific rules," he said. An employer violating the OSHA rule could face fines up to \$14,000 per employee per week, because of the weekly testing requirement, he added.

It's likely that the OSHA vaccine and testing requirement won't apply to state and local government employers, Toomey said, but he noted that states with their own occupational safety agencies often do apply workplace safety rules to government employers.

The safety agency could make the situation clearer for employers by writing the rule “to expressly preempt any state law that goes against the vaccine mandate,” said Mini Kapoor, a Houston lawyer with Haynes and Boone LLP. Without explicit preemption language, she still agreed the federal OSHA rule would override conflicting state laws.

Threading the Needle

Even if the OSHA or other federal vaccine requirements never take effect, employers arguably face conflicting legal duties already in states that limit their ability to implement vaccine requirements or other public health measures, Trim said. That’s because OSHA’s “general duty clause” requires them to maintain a safe workplace and mitigate serious hazards.

In those states, employers have to weigh the risk of state enforcement or litigation for imposing safety rules such as vaccines mandates versus the health risk of Covid-19 outbreaks if they don’t, he said.

Even in Montana, which has the strictest limit on workplace vaccine mandates, there’s likely a way for employers to “thread the needle” and impose a vaccine mandate that doesn’t violate state law, Trim added.

The Montana law bars employers from mandating vaccines that are available under an emergency use authorization or that are still undergoing safety trials. Because Pfizer’s Covid-19 vaccine has received full authorization from the U.S. Food and Drug Administration, Montana employers likely could require it for workers without violating that portion of the state law, he said, although workers terminated for their refusal could sue the employer alleging discrimination on the basis of vaccine status.

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Documents

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