

OFFICE OF THE GOVERNOR
STATE OF MONTANA

GREG GIANFORTE
GOVERNOR



KRISTEN JURAS
LT. GOVERNOR

December 22, 2021

Dear Fellow Montanans,

While I encourage Montanans to consult with their health care provider and get vaccinated, doing so is voluntary and no individual should face discrimination based on their vaccination status. Vaccine passports, or any documentation related to an individual's vaccination status, are unwarranted infringements on our liberties and illegal in Montana.

On November 5, 2021, the Occupational Safety and Health Administration (OSHA) published the "COVID-19 Vaccination and Testing Emergency Temporary Standard" applicable to employers with 100 or more employees nationwide. The OSHA mandate was immediately challenged, and its enforcement was stayed nationwide by the Fifth Circuit Court of Appeals until December 17, 2021, when the Sixth Circuit Court of Appeals issued a ruling allowing implementation of the OSHA Mandate. The Sixth Circuit ruling has also been challenged and is presently pending before the U.S. Supreme Court.

The Sixth Circuit Court of Appeals ruling is clear that no employer is obligated under the OSHA mandate to include a vaccination requirement in its COVID-19 workplace plan. Montana employers, in exercising their discretion under the OSHA mandate to determine the details of their COVID-19 workplace plans, must do so in a manner that complies with Montana's non-discrimination policy as expressed in HB 702 and codified at Mont. Code Ann. § 49-2-312, and may not include any provisions that discriminate based on a person's vaccination status.

If you are a Montana employer with 100 or more employees or an impacted employee with questions about the OSHA mandate, please refer to the attached guidance for additional information.

Sincerely,

A handwritten signature in blue ink, appearing to read "Greg Gianforte".

Greg Gianforte
Governor

Governor Gianforte's Guidance on OSHA mandate

Issued December 22, 2021

On November 5, 2021, the Occupational Safety and Health Administration (OSHA) published an Emergency Temporary Standard (OSHA mandate) entitled "COVID-19 Vaccination and Testing; Emergency Temporary Standard," applicable to employers with 100 or more employees nationwide. The OSHA mandate was immediately challenged and, until December 17, 2021, could not be enforced nationwide. The order allowing enforcement is presently before the United States Supreme Court. While Montana awaits a decision from that Court, the following guidance is provided to assist employers better understand their obligations to their employees.¹

What the OSHA Mandate Does.

As described by the federal appellate court, the OSHA mandate "does not require anyone to be vaccinated." Instead, it allows covered employers "to determine for themselves how best to minimize the risk of contracting COVID-19 in their workplaces." In other words, as interpreted by the court, the OSHA mandate affords employers discretion in how they pursue the purposes of the mandate to minimize the spread of COVID-19 in the workplace. The court provides as examples that employers may choose to have unvaccinated workers wear masks and weekly test. Employers may choose to allow employees to work from home. Employers may choose employee vaccination. And employers may choose to "opt out" of any vaccination policies.

Employers' Obligations Under Montana Law.

Under the Montana Federal Mandates Act, Mont. Code Ann. § 2-1-402, all federal mandates, including the OSHA Mandate, must be implemented in Montana in a manner that "compl[ies] with state policy as established by the legislature." Insofar as the OSHA mandate affords employers discretion, that discretion must be exercised in a manner that complies with Montana law.

Montana law is unequivocal: employers are prohibited from discriminating based on vaccination status. Under MCA § 49-2-312(1), "it is an unlawful discriminatory practice for: ... (b) an employer to refuse employment to a person, to bar a person from employment, or to discriminate 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; ..." So, while employers may choose to require workers to wear masks and test weekly, the requirement must apply to all workers regardless of vaccination status. While employers may choose to allow employees to work from home, they may not decide such allowances because of employees' vaccination status. And while employers may encourage employees to vaccinate, they may not tie or modify any terms of employment based on vaccination status.

¹ This document is not and should not be construed as legal advice.