

OFFICE OF THE GOVERNOR
STATE OF MONTANA

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LT. GOVERNOR

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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.

In September, President Biden issued an executive order, entitled "Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors." This order, which directs *new or renewed federal contracts* to require COVID-19 vaccination for contractor and subcontractor employees, has raised concerns and created confusion for Montana employees and employers, who are already struggling with a workforce shortage.

As outlined in attached guidance from my administration, President Biden's executive order violates Montana law. COVID-19 vaccine mandates, including as a condition of employment, are illegal in Montana, and state law makes clear that contract terms that violate Montana public policy are unenforceable. As such, President Biden's order is unenforceable.

If you are a Montana employer or employee contracted with the federal government with questions about President Biden's executive order, please refer to the attached guidance for additional information.

Sincerely,

Greg Gianforte
Governor

Governor Gianforte's Guidance on Federal Contracts Mandate

Issued October 27, 2021

President Biden's Executive Order, entitled "Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors," has both raised concerns and created confusion for Montana's employers regarding vaccine mandates. To assist Montana employers with navigating this issue, the following guidance is provided.¹

Who The Executive Order Applies To.

Receipt of federal funds does not mean the Executive Order applies. For example, contractors working on a federal highway project under a contract administered by the State of Montana are not subject to the Executive Order merely because the project receives federal funding. As discussed in more detail below, the Executive Order specifically excludes recipients of federal grants from the vaccine mandate.

Rather, the Executive Order applies only to those who enter certain types of new contracts with the federal government or renew those contracts, and most subcontracts to those contracts.

For existing contracts, the Executive Order acknowledges that employers are subject to state law: "For all existing contracts, ... agencies are encouraged, *to the extent permitted by law*, to ensure that the safety protocols required under those contracts ... are consistent with the requirements ... of this order." This means nothing has changed: Montana's vaccine discrimination ban applies to these existing contracts.

To determine whether an existing contract is subject to renewal, employers are encouraged to consult the contracts themselves, as they often include language addressing under what circumstances they can be renewed. The Executive Order does not create an obligation to renew existing contracts.

Exclusions for Grants and Other Specified Contracts.

The Executive Order specifically excludes federal grants. A grant is the transfer of anything of value from the federal government to a non-federal entity "to carry out a public purpose of support or stimulation authorized by a law of the United States" and where "substantial involvement is not expected" between the recipient and administering federal agency. 32 U.S.C. § 6304. This important exclusion exempts from the vaccine mandate the numerous Montana entities that deliver a wide variety of services funded with federal grants, including health care, social services, crime prevention, job training, treatment programs, and housing services. For more information on grants, go to <https://www.grants.gov/web/grants/learn-grants/grants-101.html>.

Other types of contracts excluded from the application of the Executive Order include agreements with Tribal Nations under the Indian Self-Determination and Education Assistance

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

Act, contracts valued at \$250,000 or less (other values in certain circumstances), and subcontracts solely for the provision of products.

Employers should seek legal advice to properly determine whether their contracts are covered by the Executive Order to avoid liability under Montana’s vaccine discrimination ban.

Effect of the Executive Order on New/Renewed Contracts.

Where new or renewed contracts are at issue, the Executive Order requires those contracts to contain a clause obligating the contractor or subcontractor entering the contract to comply with “all guidance for contractor or subcontract workplace locations published by the Safer Federal Workforce Task Force.” In response, this Task Force issued guidance that includes mandatory vaccination of contractor employees – that is, employees who are actually performing work relating to these new or renewed contracts, or who are working at locations where such contracts are being performed. An exception is provided “where an employee is legally entitled to an accommodation.” This exception—which includes religious and medical exemptions—is required by federal law.

But Montana law requires more. MCA § 28-2-701 makes clear that a contract, in whole or in part, is unlawful where it is either “contrary to an express provision of law” or where it is “contrary to the policy of express law.” *See MPH v. Imagineering*, 243 Mont. 342, 349 (1990) (refusing to enforce an entire agreement because the subject of the agreement was prohibited by Montana law and stating that “[a] party to an illegal contract may not use the courts of this state to enforce the agreement.”); *Belgrade Educ. Ass’n v. Belgrade Sch. Dist. No 44*, 2204 MT 318, 17 (refusing to enforce a clause in a collective bargaining agreement because it did not comply with Montana law and declaring the provision “unlawful and void.”). Parties to a contract cannot avoid the requirements of state law through contract. MCA § 1-3-204 (“A law established for a public reason cannot be contravened by a private agreement.”); *see, e.g., Rothwell v. Allstate Ins. Co.*, 1999 MT 50, ¶ 6 (“individuals may waive any of their statutory rights *unless waiver of those rights violates public policy.*”) (emphasis in original).

Here, the guidance unlawfully mandates employee vaccination in direct contravention to Montana’s vaccine discrimination ban enacted by the 2021 legislature as HB 702 and codified at MCA § 49-2-312. The guidance also illegally discriminates against unvaccinated employees by imposing masking and social distancing requirements that do not apply to vaccinated employees. The guidance violates both Montana law and public policy. As a result, any language in a new or renewed contract entered into by a Montana employer that has the effect of requiring compliance with this guidance is unenforceable. This does not render the whole contract void, but rather means that the offending language is void and unenforceable. *See* MCA § 28-2-604 (“Where a contract has several distinct objects of which one at least is lawful and one is at least unlawful, in who or in part, the contract is void as to the latter and valid as to the rest.”).

For more information on Montana’s vaccine discrimination ban, see “House Bill 702: Frequently Asked Questions” published by the Montana Department of Labor & Industry at <https://erd.dli.mt.gov/human-rights/human-rights-laws/employment-discrimination/hb-702>.

Reasonable Accommodations for Health Care Facilities

Under MCA § 49-2-312, no employer may refuse employment or discriminate against an employee based on a person's vaccination status. However, a health care facility is allowed under MCA § 49-2-312(3)(b) to implement reasonable accommodation measures for employees known or considered to be unvaccinated to protect others from communicable diseases. Such measures may, for example, include masking and social distancing requirements. Employers other than health care facilities are not allowed to implement reasonable accommodation measures for employees known or considered to be unvaccinated.

“Health care facility” is defined at MCA § 50-5-101 and does not include offices of private physicians, dentists, or other physical or mental health care workers.

Special Rules for Licensed Nursing Homes and Long-term Care and Assisted Living Facilities

MCA § 49-2-313 temporarily suspends the obligation of a licensed nursing home, long-term care facility or assisted living facility to comply with the anti-discrimination rules of MCA § 49-2-312 during any period of time that compliance would result in a violation of regulations or guidance issued by the Centers for Medicare & Medicaid Services (CMS) or the Centers for Disease Control and Prevention (CDC). There are currently no Montana licensed nursing homes, long-term care facilities or assisted living facilities for which the anti-discrimination rules of MCA § 49-2-312 have been suspended.

In the event CMS or CDC were to issue regulations or guidance that would result in a suspension of the obligation of a nursing home or long-term care or assisted living facility's to comply with the non-discrimination rules of MCA § 49-2-312, such facilities must nonetheless consider appropriate medical and religious exemptions for employees during the temporary suspension period. An overwhelming body of case law clearly holds that the First Amendment right to the free exercise of religion protects all sincerely held religious beliefs, and not just those “held because of membership in an established or recognized religion.” Mt. Att’y Gen. Op. 44-7 (1991) (ruling that a “school district should refrain from challenging an affidavit claiming a religious exemption from mandatory immunization”). “The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.” *Emp. Div., Dep’t of Hum. Res. Of Or. v. Smith*, 494 U.S. 872, 877 (1990). The resolution of what constitutes a “sincerely held religious belief” is not to turn upon an employer's perception of the particular belief or practice in question. “[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981). Title VII of the Civil Rights Act explicitly requires employers to reasonably accommodate an employee's religious beliefs absent evidence that doing so would pose an undue hardship, broadly defining religion to include “all aspects of religious observance and practice, as well as belief[.]” 42 U.S.C. § 2000e(j).