

Vaccine Status is a Protected Trait in Montana

by Steve Bell, Gabrielle Wirth, and Briana Al Taqatqa

On May 7, 2021, Governor Greg Gianforte signed House Bill 702, which prohibits discrimination based on vaccination status or possession of an immunity passport. Specifically, the Act makes it unlawful for employers to refuse employment or discriminate against a person in terms or conditions of employment based on their vaccine status. It also prohibits a person or governmental entity from denying goods, services, education, or employment opportunities based on vaccination status. Further, it prevents a place of public accommodation from limiting or excluding people based on whether they have been vaccinated. The Act states that it is based on the privacy interests of citizens in their medical information. HB 702 takes effect July 1, 2021.

The Act states that it applies to persons and governmental entities, including public schools and universities. However, the Act does not apply to existing immunization requirements that apply to Montana schools and childcare facilities. The Act also provides an exemption for licensed nursing homes, long-term care facilities, and assisted living facilities if compliance would result in a violation of Medicare, Medicaid, or CDC requirements.

The Act does not contain many definitions and leaves many unanswered questions. While the CDC guidelines contemplate that vaccinated and unvaccinated people should be treated differently, the nondiscrimination provisions of this legislation suggest that those distinctions may not be possible in Montana. For example, as of May 13, the CDC issued guidelines stating that vaccinated individuals do not need to wear masks under certain circumstances. Can a Montana employer follow those guidelines while requiring unvaccinated individuals to wear masks, or is that unpermitted discrimination under the new law? House Bill 702 raises questions for Montana employers related to conflicting compliance obligations and managing multi-state operations or interstate employee travel. If other states require unvaccinated individuals to self quarantine when entering the state, can a Montana employer refuse to assign unvaccinated individuals accounts in those states? The Act does not address these and many other practical considerations.

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The legislation does clarify that these requirements do not prohibit persons, employers, or governmental entities from *recommending* that employees get vaccinated. The Act does not directly address whether it is unlawful discrimination to require more stringent health and safety protocols for unvaccinated employees similar to current CDC guidelines.

The Act does not mention COVID-19 vaccines specifically, however, it prohibits people from being required to receive “any vaccine whose use is allowed under an emergency use authorization or any vaccine undergoing safety trials.”

Montana employers should seek legal advice to navigate these complex compliance issues. At minimum, Montana employers should scrutinize return-to-work policies that include references to vaccination status or immunity passports.