



CUT AND PASTE POST SEPTEMBER, 2021

BY REQUEST: VACCINES, SAFETY, AND MONTANA LAW

Recently, GVHRA's fearless leader Erin Loucks asked about the workplace impact of Montana's recently passed House Bill 702 (HB-702). While Erin was asking about its impact on medical providers, it's a valid question for all of Montana's employers.

In a nutshell, HB-702 prohibits discrimination in Montana based on vaccination status. Specifically, HB-702 makes it unlawful for 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."

HB-702 allows a health care facility to ask employees about their vaccination status. If an employee chooses not to provide this information, the health care facility may assume the employee is not vaccinated, which then permits the health care facility to implement "reasonable accommodation measures for employees, patients, visitors, and other persons who are not vaccinated or not immune to protect the safety and health of employees, patients, visitors, and other persons from communicable diseases."

For non-healthcare settings, employers may ask employees about their vaccination status but an employee is not required to respond, and may not be discriminated against for failing to do so. As HR professionals, we all know the pitfalls associated with asking about any protected class-related issues ...

HB-702 makes discriminating against an employee or applicant based on their vaccination status "an unlawful discriminatory practice," under the Montana Human Rights Act (MHRA). If you violate the MHRA, you are guilty of a misdemeanor which is punishable by a fine of not more than \$500 or by imprisonment for not more than 6 months, or both. In addition, if an MHRA Hearing Officer finds discrimination, the Officer may:

- "(a) prescribe conditions on the accused's future conduct relevant to the type of discriminatory practice found;
- (b) require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against;
- (c) require a report on the manner of compliance."

For more information about HB-702, go to the State of Montana's [Employment Relations Division's HB-702 FAQ's](#) and to this SHRM article: <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/montana-makes-significant-changes-to-state-employment-laws.aspx>.

At the federal level, the issue of mandatory vaccines seems to evolve daily. Focusing on the basics, it's important to remember that most employers are subject to the Occupational Safety and Health Act, which requires employers to provide a work environment free of recognized hazards. Below are the current maximum penalties for OSHA violations. Employers subject to state plans are subject to maximum penalty levels that are at least as effective as Federal OSHA's.

Type of Violation	Penalty Minimum	Penalty Maximum
Serious	[\$975] per violation	\$13,653 per violation
Other-Than-Serious	\$0 per violation	\$13,653 per violation
Willful or Repeated	[\$9,753*] per violation	\$136,532 per violation
Posting Requirements	\$0 per violation	\$13,653 per violation
Failure to Abate	N/A	\$13,653 per day unabated beyond the abatement date [generally limited to 30 days maximum]

* For a repeated other-than-serious violation that otherwise would have no initial penalty, a GBP penalty of \$390 shall be proposed for the first repeated violation, \$975 for the second repeated violation, and \$1,950 for a third repetition.]

In addition, the EEOC requires employers to make reasonable accommodations for employees who do not want to be vaccinated for religious or medical reasons.

Professional Pointer: So, in the age of dueling state and federal laws about mandatory versus non-mandatory vaccines, what's an HR professional to do? To avoid charges of discrimination, do employers just decide to require all employees to wear masks all the time? This issue makes navigating the "Bermuda Triangle" of the ADA, FMLA and workers compensation leave laws seem easy!

The best approach may be to think bigger, and longer term. During hearings into HB-702, many of the opponents pointed out that this isn't just about the COVID vaccine: it's about all vaccines. In the United States, fewer children and young adults are completing the CDC-recommended vaccinations. This means that future workplaces need to be ready to address workplace exposures to polio, diphtheria, measles, mumps, rubella, and other diseases that have historically been avoided with a 'jab.'

Workplace exposures to disease are addressed through an infection disease control plan. These are site-specific plans which identify and evaluate the likelihood of workplace exposures, and describe the engineering and work practice controls, and hazard communication and training and recordkeeping practices being implemented to address the exposures. Depending on the hazard, the plan may include offering vaccines to affected employees.

Here are a few resources that can help employers develop a worksite infection control program:

- OSHA [Control and Prevention Webpage](#)
- [29 CFR 1910.1030](#), OSHA Bloodborne Pathogens Standard
- Center for Disease Control, [Guide to infection control for outpatient settings](#) (this is geared towards outpatient medical settings such as physician's offices, but it seems much of the information would be applicable to any worksite.)
- Society for Human Resource Management [Safety and Security Toolkit](#)

