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Federal Court Enjoins HB 702 in Health Care Settings

By Mark R. Feddes

On December 9, 2022, a Montana federal district court concluded Montana’s [House Bill 702](#) is unconstitutional “as applied in health care settings.” HB 702, codified as Montana Code Annotated [§§ 49–2–312 & 313](#), prohibits discrimination based on an individual’s vaccination status or possession of an immunity passport, with limited exceptions. Judge Donald Molloy entered his [order](#) after a three-day bench trial, and imposed a permanent injunction against enforcement of HB 702 in health care settings. Notably, Judge Molloy’s order does not directly apply to other employment settings, although constitutional challenges to the enforcement of HB 702 in other employment settings are proceeding through Montana’s court system.

I. Case Background.

In response to the pandemic and advent of COVID-19 vaccines, Montana became the first state in the nation to enact legislation prohibiting discrimination based on vaccination or immunization status. HB 702’s statutory restrictions are not limited to COVID-19 vaccines. HB 702 generally prohibits persons and entities from withholding goods, services, or employment based on a person’s vaccination status or possession of an immunity passport. The statute provides limited exceptions, including an exception for licensed nursing homes, long-term care facilities, and assisted living facilities to the extent compliance would result in a violation of regulations or guidance issued by CMS or the CDC.

Following the passage of HB 702, the Biden Administration promulgated a number of COVID-19 vaccine mandates. The federal mandates applied to federal contractors and employers with 100 or more employees. In November 2021, CMS published an [Interim Final Rule](#) requiring Medicare and Medicaid-certified facilities to establish a policy ensuring that virtually all covered staff would

become fully vaccinated against COVID-19. Montana's licensed nursing homes, long-term care facilities, and assisted living facilities are overwhelmingly funded by federal funding from CMS.

In September 2021, Montana health care professionals, health care facilities, and immunocompromised patients initiated a lawsuit challenging HB 702. Plaintiffs claimed HB 702 was preempted by federal law and unconstitutional. The federal district court issued a limited preliminary injunction on March 18, 2022. The court initially enjoined enforcement of the statute against health care facilities and providers subject to the CMS Interim Final Rule because HB 702 directly conflicted with a controlling federal mandate. The question remained whether HB 702 was lawfully enforceable in other healthcare settings.

II. Court Decision.

On December 9, 2022, the federal district court agreed with plaintiffs' argument that HB 702 was unconstitutional as applied in health care settings. The court relied on two grounds. First, the court held federal law preempted HB 702 because it did not allow for accommodations, as required by the Americans with Disabilities Act. The court also noted the CMS Interim Final Rule continued to preempt conflicting state law.

Second, the court held that HB 702 violated equal protection rights guaranteed by the Montana and United States constitutions. Judge Molloy reasoned the law's different treatment of exempted facilities from similarly situated classes of health care settings bore no rational relationship to preventing discrimination. In other words, no privacy reason existed to treat exempt providers and facilities differently than other, similarly situated providers and facilities. Employees of exempted facilities enjoy the same privacy rights as other health care employees. In the court's view, the state failed to articulate a rational basis for protecting privacy rights in one setting but not the other.

III. Impacts and Questions Going Forward.

The court's decision should bring some peace of mind and clarity to employers in health care settings. The ruling permits these employers to determine the vaccination status of their employees and implement vaccination policies. Judge Molloy's order applies to all health care providers, licensed nursing homes, long-term care facilities, assisted living facilities, hospitals, health care facilities, and offices of private physicians. Notably, the injunction is not restricted to COVID-19 vaccines and applies to vaccines for other illnesses, such as measles, mumps, rubella, tetanus, diphtheria, pertussis, hepatitis, or flu.

The court abstained from deciding whether HB 702 is unconstitutional in non-health care settings, in deference to pending state court litigation on that question. It remains to be seen whether the court's opinion creates fertile ground for pending and future HB 702 challenges.

For Employers with Additional Questions

For employers with additional questions, Crowley Fleck PLLP has an experienced team of attorneys who can assist with all manner of employment questions, including questions related to compliance with HB 702. If you would like more information, please contact Crowley Fleck's Employment Practice Group.

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