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## Substitute Bill Comparative Synopsis

### Sub. H.B. 218

### 134<sup>th</sup> General Assembly

House Commerce and Labor

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This document describes Sub. H.B. 218 (I\_134\_0788-8), which removes the content of the As Introduced version of the bill (analysis available [here](#)) and replaces it with the content described below.

## SUMMARY

### Student and employee medical requirements

- Prohibits, subject to limited exceptions, a school, institution of higher education, or employer from requiring a student or employee to receive a vaccine, drug, biological product, or form of genetic immunotherapy that utilizes messenger ribonucleic acid (mRNA), deoxyribonucleic acid (DNA), or other genetic vaccine technology if it has not been issued a biologics license or otherwise been granted full approval by the federal Food and Drug Administration (FDA).
- If a school, institution, or employer requires a student or employee to receive such a vaccine, drug, product, or immunotherapy, permits the student or employee to satisfy the requirement by receiving either that vaccine, drug, product, or immunotherapy or one that is available under emergency use authorization (EUA).
- Establishes for a student or employee the following exemptions from the requirement: medical contraindications, natural immunity, and reasons of personal conscience (including religious convictions).
- Requires a student or employee to submit a written statement to claim an exemption, with additional requirements for an exemption based on medical contraindications or natural immunity.
- Provides for a student or employee to seek relief in the event of a violation, including bringing a mandamus action and, in the case of an employee, an employment discrimination claim.

- Sunsets the bill’s provisions regarding student and employee medical requirements on September 30, 2025.

## **Workers’ compensation and employer-mandated medical requirements**

- Specifies that an injury caused by receiving an employer-mandated COVID-19 vaccine is an injury under the Workers’ Compensation Law.
- Prohibits, for claims arising during the period beginning on the bill’s effective date and ending September 30, 2025, a person from receiving workers’ compensation for an injury caused by an employer-mandated vaccine that utilizes mRNA, DNA, or other genetic vaccine technology if the person receives compensation under the National Childhood Vaccine Injury Act or the Public Readiness and Emergency Preparedness Act.

## **Vaccine passports**

- Prohibits an individual from being required to show proof of vaccination against COVID-19 for any reason, including to enter a facility controlled, operated, or owned by a public or private entity or to receive a service provided by the public or private entity.
- Permits a court to award attorney’s fees to the prevailing party in any action to enforce the above provision.

## **Emergency medical technicians – COVID-19 tests**

- Permits emergency medical technicians who have received proper training to (1) administer COVID-19 tests and (2) collect and label test specimens.

## **Qualified civil immunity**

- Extends through June 30, 2023, the provisions of H.B. 606 of the 133<sup>rd</sup> General Assembly granting immunity for exposure to or transmission or contraction of certain coronaviruses.
- Grants temporary qualified immunity from September 30, 2021, through June 30, 2023, to specified health care providers (including hearing aid dealers and hearing aid fitters) providing health care services, emergency services, first-aid treatment, or other emergency professional care as a result of and in response to an outbreak of certain coronaviruses.

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## DETAILED ANALYSIS

### Student and employee medical requirements

#### No FDA approval – prohibition

The bill prohibits each of the following entities from requiring a student or employee to receive a vaccine, drug, biological product, or form of genetic immunotherapy utilizing messenger ribonucleic acid (mRNA), deoxyribonucleic acid (DNA), or other genetic vaccine technology for which the federal Food and Drug Administration (FDA) has not issued a biologics license or otherwise granted full approval:

- A public school;
- A chartered nonpublic school;
- A private college;
- A state institution of higher education;
- An employer.<sup>1</sup>

However, an employer that, as a regular part of its business, conducts research on, develops, handles, administers, transports, or stores infectious organisms and that is not a

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<sup>1</sup> R.C. 3792.05(B) and 3792.07(B).

hospital may require an employee to receive such a vaccine, drug, biological product, or form of genetic immunotherapy.<sup>2</sup>

### **Note on full approval, biologics license, and emergency use authorizations**

The bill specifies that neither a biologics license nor full approval is the same as emergency use authorization (EUA) granted by the FDA.<sup>3</sup>

In the case of a vaccine, to receive full FDA approval, the vaccine's manufacturer must submit to the FDA a Biologics License Application. At present, the Pfizer-BioNTech COVID-19 vaccine has been issued a biologics license (under which the vaccine may be marketed as Comirnaty) and EUA, while the Moderna and Janssen (Johnson & Johnson) COVID-19 vaccines are available, but only under EUA.

### **Licensed or fully approved vaccines, drugs, biological products, and forms of genetic immunotherapy required by schools and employers**

If a school, institution of higher education, or employer requires a student or employee to receive a vaccine, drug, biological product, or form of genetic immunotherapy that (1) utilizes mRNA, DNA, or other genetic vaccine technology and (2) has been issued a biologics license or otherwise granted full approval, the bill permits the student or employee to satisfy the requirement by receiving either that vaccine, drug, product, or immunotherapy or one that has been granted EUA against the same disease.<sup>4</sup>

### **Available exemptions**

The bill exempts a student or an employee from the requirement described above for any of the following reasons:

- Medical contraindications;
- Natural immunity;
- Reasons of personal conscience, including religious convictions.

The exemptions are not available to a student who, as part of the student's course of study, undergoes instruction or training at either of the following owned or operated by, or affiliated with, an institution of higher education:

- A children's hospital;
- An intensive care or critical care unit of a hospital.

The bill requires the institution to make a good faith effort to provide equitable instruction and training to a student who refuses a COVID-19 vaccine.

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<sup>2</sup> R.C. 3792.07(F).

<sup>3</sup> R.C. 3792.05(B) and 3792.07(B).

<sup>4</sup> R.C. 3792.05(C) and 3792.07(C).

Similarly, the exemptions are not available to an employee employed in a children's hospital or a hospital intensive care or critical care unit. An employer must make a good faith effort to provide equitable employment for such an employee who refuses a COVID-19 vaccine.

The bill states that it does not limit, diminish, or affect limitations on state and federal law relating to employment discrimination, or, with respect to students, federal law governing discrimination.<sup>5</sup> For example, federal law prohibits discrimination in employment based on an individual's religion or disability.<sup>6</sup> And the Ohio Civil Rights Law and the rules adopted under it regarding disability and religious discrimination are similar to Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act.<sup>7</sup>

### **Claiming an exemption**

The bill establishes how a student or employee may claim an exemption. With respect to an exemption for a medical contraindication, the bill requires the student or employee to submit to the school, institution of higher education, or employer a written statement signed by a physician who has a bona fide physician-patient relationship with the student or employee. For a reasons of personal conscience exemption, including religious convictions, the student or employee must submit to the school, institution, or employer a written statement. A student or employee is not required to submit any additional information beyond the written statement to claim these exemptions.<sup>8</sup>

#### ***Medical contraindications – bona fide physician-patient relationship***

To be eligible to sign the written statement that a student or employee must submit to claim an exemption for medical contraindications, a physician must have a bona fide physician-patient relationship with the student or employee. Such a relationship is established if all of the following are the case:

- The physician has conducted an in-person examination of the student or employee;
- The physician has reviewed the student's or employee's medical history;
- The physician expects to provide care to the student or employee on an ongoing basis;
- The student or employee expects to receive care from the physician on an ongoing basis.<sup>9</sup>

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<sup>5</sup> R.C. 3792.05(C) and (E) and 3792.07(C) and (F).

<sup>6</sup> 42 United States Code (U.S.C.) 2000e-2 and 42 U.S.C. 12111 and 12112(a).

<sup>7</sup> R.C. 4112.01 and 4112.02, not in the bill; Ohio Administrative Code Chapter 4112.

<sup>8</sup> R.C. 3792.05(D) and 3792.07(D).

<sup>9</sup> R.C. 4731.77.

### ***Natural immunity***

In the case of an exemption for natural immunity, the student or employee must submit to the school, institution, or employer written documentation that the student or employee has been tested for the presence of antibodies against the same disease in a form or manner recognized by the medical community and at the time of testing, had antibodies in an amount at least equal to or greater than those conferred by a vaccine, drug, biological product, or form of genetic immunotherapy utilizing mRNA, DNA, or other genetic vaccine technology for which the FDA has issued a biologics license or otherwise granted full approval.

The bill requires the Ohio Department of Health (ODH) to adopt rules establishing the frequency with which a student or employee must be retested for the presence of these antibodies. In adopting the rules, ODH cannot require retesting more than once per year. Until the rules are adopted, however, the student or employee is not required to submit any additional information beyond the initial written documentation.<sup>10</sup>

The bill does not specify how the standard of a test that is “recognized by the medical community” will be determined. Additionally, it is unclear how a school or employer would make the determination that a student or employee’s antibody levels meet or exceed those conferred by a vaccine, drug, biological product, or form of genetic immunotherapy utilizing mRNA, DNA, or other genetic vaccine technology, as the bill does not require ODH to adopt rules on this topic.

A student or employee who is exempt based on natural immunity is responsible under the bill for any costs or fees associated with demonstrating natural immunity to the school, institution of higher education, or employer.<sup>11</sup>

### ***Reasons of personal conscience***

A school, institution of higher education, or employer must honor and accept a reasons of personal conscience exemption once a student or employee submits the written statement necessary to claim it. A school or institution cannot expel a student, and an employer cannot terminate an employee’s employment, because the exemption was claimed.<sup>12</sup>

### **Confidentiality**

Under the bill, a written statement or document submitted to claim an exemption is confidential, is not a public record, and may be shared by a school, institution of higher education, or employer with authorized personnel only to the extent necessary to comply with the bill.<sup>13</sup>

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<sup>10</sup> R.C. 3792.05(D) and 3792.07(D).

<sup>11</sup> R.C. 3792.05(F) and 3792.07(E).

<sup>12</sup> R.C. 3792.05(D) and 3792.07(D).

<sup>13</sup> R.C. 3792.05(D) and 3792.07(D).

## **Student participation in activities**

The bill prohibits a K-12 school from denying a student the opportunity to participate in activities affiliated with the school or on school property based solely on the student's COVID-19 vaccination status.<sup>14</sup>

## **Costs of mitigation measures**

Under the bill, a student or employee is not responsible for any costs or fees associated with measures required by a school, institution of higher education, or employer to prevent the spread of any disease, including testing for active infection and masking.<sup>15</sup>

## **Collective bargaining**

The bill specifies that the prohibitions and requirements regarding vaccines, drugs, biological products, and forms of genetic immunotherapy utilizing mRNA, DNA, or other genetic vaccine technology do not impede or diminish collective bargaining rights with respect to terms and other conditions of employment related to those vaccines, drugs, products, and therapies. However, it prohibits provisions of a collective bargaining agreement entered into before, on, or after the bill's effective date relating to those vaccines, drugs, products, and therapies from applying to a person who is not subject to the terms of the agreement.<sup>16</sup>

## **Employee and student remedies**

Under the bill, an employee may seek relief for violations through continuing law procedures applicable to state employment discrimination claims. Under this process, a person may file a charge with the Ohio Civil Rights Commission if the person believes an unlawful discriminatory practice relating to employment occurred (the person must do so before filing a lawsuit). The Commission may investigate the charge, and continuing law prescribes procedures for conducting a hearing and other dispute resolution procedures if the Commission determines that it is probable an unlawful discriminatory practice relating to employment occurred. Additionally, the Commission must issue a right to sue notice, allowing the person to instead file a lawsuit and remove the claim from the Commission's jurisdiction, under certain circumstances. If the Commission finds an unlawful discriminatory practice relating to employment occurred, the bill limits available remedies in such claims to a cease and desist order, back pay, and, for the prevailing party, reasonable attorney's fees.

Alternatively, a public sector employee may elect to pursue a mandamus action against an employer, rather than an action based on employment discrimination. In a mandamus action by a public sector employee, a court may award reasonable attorney's fees to the prevailing party.<sup>17</sup>

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<sup>14</sup> R.C. 3792.05(G).

<sup>15</sup> R.C. 3792.05(F) and 3792.07(E).

<sup>16</sup> R.C. 3792.07(G).

<sup>17</sup> R.C. 3792.08.

In the case of a student, the bill authorizes the student to bring a mandamus action in the event a school or institution of higher education violates the bill and permits the court to award reasonable attorney's fees to the prevailing party.<sup>18</sup>

### **Sunset clause**

The bill specifies that its provisions related to student and employee medical requirements sunset on September 30, 2025.<sup>19</sup>

### **Workers' compensation and employer-mandated medical requirements**

The bill expressly provides that an injury covered under the Workers' Compensation Law<sup>20</sup> includes an injury or disability caused by a COVID-19 vaccine that the employee's employer required the employee receive. Currently, an injury includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of and arising out of the employee's employment.<sup>21</sup>

Ohio courts have generally recognized that an employee injured by an employer-mandated vaccine is eligible for compensation and benefits under the law.<sup>22</sup> By specifying that an injury caused by an employer-mandated COVID-19 vaccine is compensable, it is possible that one could interpret the bill to exclude compensation and benefits for an injury caused by other employer-mandated vaccines.

For claims arising during the period between the bill's effective date and September 30, 2025, a person cannot receive workers' compensation for an injury caused by an employer-mandated vaccine that uses mRNA, DNA, or other genetic vaccine technology if the person receives compensation for the same injury under the federal Vaccine Injury Compensation Program (VICP) or the Countermeasures Injury Compensation Program (CICP). If a person receives compensation or benefits under the Workers' Compensation Law and compensation under either federal program, the bill allows the Administrator of Workers' Compensation or a self-insuring employer to collect both of the following from the person:

- The amount of compensation or benefits paid to or on behalf of the person by the Administrator or the self-insuring employer pursuant to Workers' Compensation Law;

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<sup>18</sup> R.C. 3792.05.

<sup>19</sup> Section 3.

<sup>20</sup> R.C. Chapters 4121, 4123, 4127, and 4131.

<sup>21</sup> R.C. 4123.01.

<sup>22</sup> See, e.g., *Spicer Mfg. Co. v. Tucker*, 127 Ohio St. 421 (1934) and *Rolsen v. Walgreen Co.*, 2016-Ohio-8304 (8<sup>th</sup> Dist. 2016).

- Any interest, attorney's fees, and costs the Administrator or the self-insuring employer incurs in collecting that payment.<sup>23</sup>

VICP and CICP are no-fault alternatives to the traditional legal system for resolving vaccine injury petitions. Under VICP, any person who received a covered vaccine and believes the person was injured as a result can file a petition for compensation. The CICP is a similar program that provides compensation when a person is injured by a vaccine, medication, device, or other item recommended to diagnose, prevent or treat a declared pandemic, epidemic, or security threat.<sup>24</sup>

## Vaccine passports

The bill prohibits an individual from being required to show proof of vaccination against COVID-19 for any reason, including the following:

- To enter a building, facility, or place controlled, operated, or owned by any business, political subdivision, public official, or state agency;
- To receive a service provided by any business, political subdivision, public official, or state agency;
- To enter a building, facility, or place controlled, operated, or owned by a court or to receive a service provided in such a building, facility, or place, but only if the individual enters for purposes other than attending a court proceeding or event or receives a service not related to a court proceeding or event.<sup>25</sup>

It also authorizes a court to award attorney's fees to the prevailing party in any action to enforce this prohibition.

Note that the bill defines proof of COVID-19 vaccination to include a paper document or digital application, including a scannable code. Additionally, a state agency does not include a court.

## Emergency medical technicians – COVID-19 tests

The bill codifies provisions of S.B. 310 from the 133<sup>rd</sup> General Assembly (expired May 1, 2021) authorizing emergency medical technicians at the basic, intermediate, and paramedic levels who have received proper training to (1) administer COVID-19 tests and (2) collect and label test specimens.<sup>26</sup>

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<sup>23</sup> R.C. 4123.87.

<sup>24</sup> See Health Resources & Services Administration (HRSA), *National Vaccine Injury Compensation Program*, available [here](#) and HRSA, *Countermeasures Injury Compensation Program*, available [here](#).

<sup>25</sup> R.C. 3792.06.

<sup>26</sup> R.C. 4765.60.

## Qualified civil immunity

The bill enacts a new type of qualified immunity and extends through June 30, 2023, the provisions of H.B. 606 of the 133<sup>rd</sup> General Assembly (which expired September 30, 2021), that granted immunity for exposure to or transmission or contraction of certain coronaviruses.<sup>27</sup> For more information on H.B. 606, please see [this link](#).

H.B. 606 granted temporary qualified immunity to health care providers providing health care services, emergency services, first-aid treatment, or other emergency professional care as a result of or in response to a disaster or emergency. The bill enacts similar provisions that grant immunity for those services provided as a result of **and** in response to an outbreak of MERS-CoV, SARS-CoV, or SARS-CoV-2, or any mutation thereof. The bill also adds hearing aid dealers and hearing aid fitters to the list of health care providers covered by the immunity. Finally, unlike H.B. 606 the word “allegedly” is not included when describing injuries, death, or loss to person or property that arise from acts, omissions, decisions, or compliance of a health care provider.

Section 28, Article II of the Ohio Constitution prohibits the General Assembly from enacting laws imposing new substantive duties and obligations upon a person’s past conduct and transactions. Retroactive laws that are remedial rather than substantive in nature do not violate the prohibition against retroactive laws. Accordingly, the bill specifies that the provisions regarding temporary qualified civil immunity are remedial in nature and apply retroactively to acts, omissions, conduct, decisions, or compliance from September 30, 2021, through June 30, 2022.<sup>28</sup>

## Severability

The bill specifies that its provisions are severable, meaning that if an item of law or the application of the item to a particular circumstance is held invalid, the invalidity does not affect other items of law or applications that can be given effect without the invalid item of law or application.<sup>29</sup>

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## COMMENT

The bill may raise the following legal issues:

- **Retroactivity** – Some of the bill’s provisions apply back to dates that will occur before the bill’s effective date. This could impair existing legal duties and rights in violation of the Ohio Constitution’s prohibitions against retroactive laws.<sup>30</sup>

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<sup>27</sup> Sections 4 and 5.

<sup>28</sup> Section 6.

<sup>29</sup> Section 7.

<sup>30</sup> Ohio Constitution, Article II, Section 28.

- **Municipal home rule** – The bill prohibits an individual from being required to show proof of vaccination against COVID-19 for any reason, including to enter a facility owned by a political subdivision or to receive a service provided by a political subdivision. It also prohibits municipal or charter county employers from requiring an employee to receive a vaccine, drug, biological product, or form of genetic immunotherapy utilizing mRNA, DNA, or other genetic vaccine technology for which the FDA has not issued a biologics license or otherwise granted full approval. This may raise concerns under the municipal home rule provisions in the Ohio Constitution.<sup>31</sup>
- **Contracts Clause** – The bill’s provision limiting the application of certain provisions in a collective bargaining agreement entered into before the bill’s effective date may impair existing contracts in violation of the U.S. and Ohio constitutions.<sup>32</sup>
- **The National Labor Relations Act (NLRA)** – The NLRA generally governs private sector labor relations and has broad preemption authority. States are limited in their ability to regulate in this area. Thus, the bill’s prohibition against applying a provision in a private sector collective bargaining agreement to nonparties to the agreement may be preempted.<sup>33</sup>
- **The Occupational Safety and Health Administration (OSHA)** – OSHA recently adopted an emergency temporary standard (ETS) generally requiring an employer with 100 or more employees to “develop, implement, and enforce a mandatory COVID-19 vaccination policy.” OSHA has taken the position that the ETS preempts state laws to the extent that the two conflict (the ETS currently is being challenged in federal court and cannot be enforced while litigation is pending).

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<sup>31</sup> Ohio Const., art. XVIII, sec. 3.

<sup>32</sup> U.S. Constitution, Article I, Section 10; Ohio Const., art. II, sec. 28.

<sup>33</sup> 29 U.S.C. 151 *et seq.*