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# OHIO LEGISLATIVE SERVICE COMMISSION

Office of Research  
and Drafting

Legislative Budget  
Office

H.B. 435\*  
134<sup>th</sup> General Assembly

## Bill Analysis

[Click here for H.B. 435's Fiscal Note](#)

**Version:** As Reported by House Health

**Primary Sponsors:** Reps. Carfagna and Seitz

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## SUMMARY

### Student and employee vaccinations

- Prohibits a school or institution of higher education from requiring a student to receive a COVID-19 vaccine if it has not been issued a biologics license by the federal Food and Drug Administration (FDA).
- Prohibits, with one exception, an employer from requiring an employee to receive any vaccine that has not been issued a biologics license.
- If a school, institution, or employer requires a student or employee to receive a COVID-19 vaccine that has been granted a biologics license, permits the student or employee to satisfy the requirement by receiving either that vaccine or a COVID-19 vaccine that is available under an emergency use authorization.
- Establishes for a student or employee the following exemptions from a COVID-19 vaccination requirement: medical contraindications, natural immunity, and reasons of conscience (including religious convictions).
- Requires a student or employee to submit a written statement to claim an exemption with additional requirements for exemptions based on medical contraindications or natural immunity.

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\* This analysis was prepared before the report of the House Health Committee appeared in the House Journal. Note that the legislative history may be incomplete.

- 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 vaccinations on June 30, 2023.

## **Workers' compensation and employer mandated COVID-19 vaccinations**

- Specifies that an injury caused by receiving an employer-mandated COVID-19 vaccine is an injury covered by the Workers' Compensation Law.
- Prohibits, for claims arising during the period beginning on the bill's effective date and ending June 30, 2023, a person from receiving workers' compensation for an injury caused by an employer-mandated COVID-19 vaccine if the person receives compensation under the National Childhood Vaccine Injury Act or the Public Readiness and Emergency Preparedness Act.

## **Vaccine passports**

- Prohibits a facility owned by a political subdivision or state agency from requiring an individual to show proof of vaccination against COVID-19 in order to gain admission to or enter the facility.

## **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 (expiring September 30, 2021), which grant temporary qualified civil immunity for (1) health care and emergency services provided during a government-declared disaster or emergency and (2) exposure to or transmission or contraction of certain coronaviruses.
- Includes a hearing aid dealer and hearing aid fitter within H.B. 606's definition of a health care provider.

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# **DETAILED ANALYSIS**

## **Student and employee vaccinations**

### **Vaccines without full FDA approval – prohibition**

The bill prohibits each of the following entities from requiring a student to receive a COVID-19 vaccine for which the federal Food and Drug Administration (FDA) has not granted full approval, more formally known as a biologics license:

- A public school;

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

It also prohibits an employer from requiring an employee to receive any vaccine for which the FDA has not issued a biologics license. 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 hospital may require an employee to receive such a vaccine.<sup>2</sup>

#### **Note on H.B. 244**

The bill does not specifically address law enacted by H.B. 244 of the 134<sup>th</sup> General Assembly (which takes effect October 13, 2021) that prohibits public schools and state institutions of higher education from doing the following:

- Requiring an individual to receive a vaccine for which the FDA has not granted full approval;
- Discriminating against an individual who has not received the vaccine, including by requiring the individual to engage in or refrain from engaging in activities or precautions that differ from the activities or precautions of an individual who has received such a vaccine.<sup>3</sup>

While H.B. 435 does overlap with H.B. 244 with regard to the vaccine mandate prohibition for public K-12 and state higher education students, H.B. 244 is broader in that it applies to any vaccine for which the FDA has not granted full approval rather than only COVID-19 vaccines. Additionally, H.B. 435 does not include a prohibition against discrimination, and applies to private schools and universities.

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

The bill specifies that a biologics license is not the same as an [emergency use authorization](#) granted by the FDA.<sup>4</sup>

To receive full FDA approval, a vaccine manufacturer must submit to the FDA a [Biologics License Application](#).<sup>5</sup> At present, the [Pfizer-BioNTech COVID-19 vaccine](#) has been issued a biologics license (under which the vaccine may be marketed as Comirnaty) and an emergency

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

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

<sup>3</sup> R.C. 3792.04.

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

<sup>5</sup> 42 United States Code (U.S.C.) 262.

use authorization, while the [Moderna](#) and [Janssen](#) (Johnson & Johnson) COVID-19 vaccines are available, but only under emergency use authorizations.

## **Fully approved COVID-19 vaccines required by schools and employers**

If a school, institution of higher education, or employer requires a student or employee to receive a COVID-19 (fully approved) vaccine, the bill permits the student or employee to satisfy the requirement by receiving either that vaccine or another COVID-19 vaccine that has been granted an emergency use authorization.<sup>6</sup>

### **Available exemptions**

The bill exempts a student or an employee (if employed by the employer on or before the bill's effective date) from a COVID-19 vaccination requirement for any of the following reasons:

- Medical contraindications;
- Natural immunity;
- Reasons of 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.

Similarly, the exemptions are not available to an employee to whom either of the following apply:

- The employee is employed in a children's hospital or a hospital intensive care or critical care unit;
- The employee begins employment after the bill's effective date.

The bill includes language stating that it does not limit, diminish, or affect limitations on employer vaccine requirements contained in state and federal law.<sup>7</sup> For example, federal law prohibits discrimination based on an individual's religion or disability.<sup>8</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>9</sup>

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<sup>6</sup> R.C. 3792.06(C)(1) and 3792.07(C)(1).

<sup>7</sup> R.C. 3792.05(C)(2) and (E) and 3792.07(C)(2) and (F).

<sup>8</sup> 42 U.S.C. 2000e-2 and 42 U.S.C. 12111 and 12112(a).

<sup>9</sup> R.C. 4112.01 and 4112.02, not in the bill; Ohio Administrative Code Chapter 4112.

## **Claiming an exemption**

The bill includes provisions establishing 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 the student's or employee's primary care provider. This is similar to existing law that applies with respect to state mandated vaccines for school children and children in child care.<sup>10</sup> And for a reason of conscience exemption, including religious convictions, the student or employee must submit to the school, institution, or employer a written statement.

The bill also specifies that the student or employee is not required to submit any additional information beyond the written statement to claim these exemptions.

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 COVID-19 antibodies 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 COVID-19 vaccine for which the FDA has issued a biologics license. The bill requires the Ohio Department of Health to adopt rules establishing the frequency with which a student or employee must be retested for the presence of COVID-19 antibodies. Until the rules are adopted, however, the student or employee is not required to submit any additional information beyond the initial written documentation.<sup>11</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 vaccination, as the bill does not require the Department to adopt rules on this topic.

## **Costs of demonstrating natural immunity**

In the case of a student or employee who is exempt from COVID-19 vaccination because of natural immunity, the student or employee 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>12</sup>

## **Costs of mitigation measures**

A student or employee, who is exempt from COVID-19 vaccination is not responsible, under the bill, for any costs or fees associated with measures required by the school, institution, or employer to prevent the spread of COVID-19, including testing for active infection and

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<sup>10</sup> R.C. 3313.671(B)(4) and 5104.014(C).

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

<sup>12</sup> R.C. 3792.05(F)(2) and 3792.07(E)(2).

masking.<sup>13</sup> With the exception of this provision, the bill does not address mask requirements or quarantine policies.

### **Collective bargaining**

The bill specifies that the prohibitions and requirements regarding employee COVID-19 vaccinations do not impede or diminish collective bargaining rights with respect to terms and other conditions of employment related to vaccines. However, it prohibits COVID-19 vaccine-related provisions of a collective bargaining agreement entered into before, on, or after the bill's effective date from applying to a person who is not a party to the agreement.<sup>14</sup>

### **Employee and student remedies**

Under the bill, a private sector or public sector 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 a 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>15</sup>

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's provisions, and permits the court to award reasonable attorney's fees to the prevailing party.<sup>16</sup>

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<sup>13</sup> R.C. 3792.05(F)(1) and 3792.07(E)(1).

<sup>14</sup> R.C. 3792.07(F) (in what appears to be a drafting error, this should likely be R.C. 3792.07(G)).

<sup>15</sup> R.C. 3792.08.

<sup>16</sup> R.C. 3792.05.

## Sunset clause

The bill specifies that its provisions related to student and employee vaccinations sunset on June 30, 2023.<sup>17</sup>

## Workers' compensation and employer-mandated vaccines

The bill expressly provides that an injury covered under the Workers' Compensation Law<sup>18</sup> includes an injury or disability caused by a COVID-19 vaccine that the employee's employer required the employee receive.<sup>19</sup> 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.

Ohio courts have generally recognized that an employee injured by an employer-mandated vaccine is eligible for compensation and benefits under the law.<sup>20</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 June 30, 2023, a person cannot receive workers' compensation for an injury caused by an employer mandated COVID-19 vaccine 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;
- Any interest, attorney's fees, and costs the Administrator or the self-insuring employer incurs in collecting that payment.<sup>21</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

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<sup>17</sup> Section 3.

<sup>18</sup> R.C. Chapters 4121, 4123, 4127, and 4131.

<sup>19</sup> R.C. 4123.01.

<sup>20</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).

<sup>21</sup> R.C. 4123.87.

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>22</sup>

## **Vaccine passports**

The bill prohibits a facility owned by a political subdivision or state agency (other than a court) from requiring an individual to show proof of vaccination against COVID-19 in order to gain admission to or enter the facility. It defines proof of COVID-19 vaccination to include a paper document or digital application, including a scannable code.<sup>23</sup>

## **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>24</sup>

## **Qualified civil immunity**

The bill extends through June 30, 2023, the provisions of H.B. 606 of the 133<sup>rd</sup> General Assembly (expiring September 30, 2021), which grant temporary qualified civil immunity for (1) health care and emergency services provided during a government-declared disaster or emergency and (2) exposure to or transmission or contraction of certain coronaviruses.<sup>25</sup> For more information on H.B. 606, please see [this link](#).

The bill extends the temporary qualified civil immunity to hearing aid dealers and hearing aid fitters, by including them within H.B. 606's definition of 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, 2023.<sup>26</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

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<sup>22</sup> See Health Resources & Services Administration (HRSA), *National Vaccine Injury Compensation Program*, available [here](#) and HRSA, *Countermeasures Injury Compensation Program*, available [here](#).

<sup>23</sup> R.C. 3792.06.

<sup>24</sup> R.C. 4765.60.

<sup>25</sup> Sections 4 and 5.

<sup>26</sup> Section 6.



other items of law or applications that can be given effect without the invalid item of law or application.<sup>27</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 and apply the H.B. 606 immunity provisions to a new provider. This could impair existing legal duties and rights in violation of the Ohio Constitution’s prohibitions against retroactive laws.<sup>28</sup>
- **Municipal home rule** – the bill prohibits facilities owned by municipal corporations from requiring proof of COVID-19 vaccination as well as those prohibiting municipal or charter county employers from requiring an employee to receive a vaccine that has not been issued an FDA biologics license. This may raise concerns under the municipal home rule provisions in the Ohio Constitution.<sup>29</sup>
- **Contracts Clause**, specifically the bill’s provision limiting the application of certain vaccine-related 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>30</sup>
- **The National Labor Relations Act**, 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 vaccine-related provision in a private sector collective bargaining agreement to nonparties to the agreement may be preempted.<sup>31</sup>

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## HISTORY

Action	Date
Introduced	09-27-21
Reported, H. Health	--

H0435-RH-134/ts

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<sup>27</sup> Section 7.

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

<sup>29</sup> Ohio Const., art. XVIII, sec. 3.

<sup>30</sup> U.S. Const., art. I, sec. 10; Ohio Const., art. II, sec 28.

<sup>31</sup> 29 U.S.C. secs. 151 *et seq.*