



B I L L E R & K I M B L E
L L C

May 20, 2021

The Ohio General Assembly
1 Capitol Square
Columbus, OH 43215

Via: *email*

Re: Sub. H.B. 248

Dear Legislators,

We write to support Sub. H.B. 248.

We are a law firm based in Columbus and Cincinnati that represents employees in cases involving unpaid minimum wages and overtime. Most of our work involves representing the rights of low-wage workers. As both employers ourselves and advocates for employees, we feel uniquely positioned to consider this issue.

Over the past year we witnessed government agencies take a leading role in restricting the rights of individuals and forcing businesses into compliance with local COVID restrictions. By controlling businesses through either direct or indirect coercion, the government has exercised inordinate control over citizens.

Without action on the part of this body, businesses are preparing themselves to infringe on individuals' healthcare choices by refusing to employ or provide services to those people who do not follow the businesses' guidelines on vaccines. Employers and businesses have neither the expertise nor the right to dictate the private healthcare choices—including those involving vaccines—of individual Ohioans. Ohioans should not be forced to make a choice between getting a vaccine and being able to access ordinary services or provide for their families.

Below, we outline some of the reasons that we support the Bill.

1. The Bill prevents discrimination and the invasion of Ohioans' private lives.

There are *many* reasons to prevent vaccine-status discrimination, but we wish to highlight some that we are particularly concerned about due to our expertise in employment litigation:

A. Vaccine mandates discriminate against low-income workers and the poor.

Our firm primarily represents minimum wage workers. Their work options are far more limited than many white-collar professionals. If large employers require vaccinations, our clients will have no choice but to submit to them. They cannot simply "find a different job." Any other job they could find would almost

BILLER & KIMBLE, LLC
8044 Montgomery Road, Suite 515
Cincinnati, OH 45236

Biller Direct (614) 604-8759
Kimble Direct (513) 715-8711

abiller@billerkimble.com
akimble@billerkimble.com
www.BillerKimble.com

certainly also require them to be vaccinated. These workers will be coerced into taking a vaccine (or submitting to any other healthcare choices the employer dictates) because the alternative is being unable to provide for themselves and their families.

Moreover, unlike the wealthy, who can either find alternatives or simply break the rules (as we have seen some governors do), ordinary Ohioans may be shut out of normal life through vaccine mandates or passports. Neither the grocery store nor an airline should be dictating what medicines, vaccines, or treatments Ohioans take.

B. Vaccine mandates discriminate against racial minorities.

Vaccine-based discrimination may disproportionately impact certain racial minorities. The Ohio Health Department reports that the overwhelming majority of people who have completed vaccinations are non-Hispanic Whites, and that vaccination rates are decreasing.¹ Whatever the reason may be, it appears that there will be a permanent racial disparity in vaccination status. As a result, permitting discrimination based on vaccinated status may result in *de facto* racial discrimination.

C. Vaccine mandates are a slippery slope toward further invasion of employees' private lives.

If an employer or the government can mandate a vaccination because they believe it is good for your health or the health of others, then what else will they be able to require? Many employers, or the government, pay for or subsidize healthcare. Perhaps employers should be able to mandate that an employee take a multivitamin, or fish oil, or undergo corrective eye surgery, or complete a certain amount of exercise, or a certain diet as a condition of employment? Similarly, if employers can mandate healthcare choices based on productivity concerns, can employers start requiring the use of birth control or other contraceptives, or require employees to obtain permission before having a child? After all, maternity or paternity leave might cut into productivity.

Many are rightly concerned about a large, intrusive government threatening our freedoms. However, the experience of recent years has proven that businesses—especially when acting in league with the government—can pose a similar, *if not greater*, threat.

We are currently in the midst of big businesses acting as quasi-governments, monitoring and dictating their employees' and customers' activities, but without the restraints contained in our Constitution and shared values. What corporations are doing at this time is frighteningly similar to China's social credit score system.

When the Founders established the American system of government, they may not have anticipated the threat of government by corporations, corporations that can now observe virtually every part of an employee's life. Perhaps we assumed that business would share our American values. It is clear now, however, that some large businesses are opposed to traditional American values. Big Tech, Big Media, Big Finance and other large corporations have all variously begun stifling free speech and inserting themselves into the political arena to impose their own views on social issues—issues that rarely touch on the company's actual business.

Now, without action on your part, businesses are positioning themselves to demand that citizens take experimental “vaccines” or be excluded from normal activities like shopping or traveling.

¹ This statement relies on the data at: <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/dashboards/covid-19-vaccine/covid-19-vaccination-dashboard> (last visited May 20, 2021).

Protecting Americans from Big Businesses that act as an extension of Big Government is the struggle of our times.

2. The Substitute Bill harnesses the free market to protect Ohioans.

We support the inclusion in the Substitute Bill of an enforcement mechanism that allows Ohioans who do suffer from discrimination or unlawful coercion to sue for their attorneys' fees and costs. From our experience representing the rights of workers, the inclusion of this provision is necessary to encourage lawyers to represent individuals in these types of cases.

Stating that someone has a right is well and good. But, the right is worthless if you cannot enforce it.

Like the Substitute Bill, the federal and Ohio wage and hour laws that we deal with include "fee shifting provisions" that allow plaintiffs to sue for the cost of hiring their attorney. Without this provision, aggrieved workers are unlikely to find lawyers to take on their cases because the potential damages are too low to justify a contingent fee. And, those most likely to be aggrieved are also those most unlikely to be able to afford to pay a lawyer on an hourly basis to vindicate his or her rights.

Private rights of action and fee shifting harness the power of the free market by encouraging attorneys to vigorously protect people's rights. If H.B. 248 is to mean anything, it will need a fee-shifting provision.

This is why Sub. H.B. 248. Sec. 1(G) (1) and (3) are so important. It will allow Ohioans to vindicate their own rights. They will not have to hope that some bureaucrat will decide they merit protection; instead they can call an attorney and assert their rights in court.

3. You should consider adding an anti-retaliation provision to the Bill.

It is commonplace in employee-protection laws, like the Fair Labor Standards Act and Ohio's minimum wage constitutional amendment, that individuals are protected from retaliation for asserting their rights. We encourage you to add similar protections to Sub H.B. 248. The language in Article II, Section 34a of the Ohio Constitution may provide a useful template for such a provision:

No employer shall discharge or in any other manner discriminate or retaliate against an employee for exercising any right under this section or any law or regulation implementing its provisions or against any person for providing assistance to an employee or information regarding the same.

* * *

Where an employer is found by the state or a court to have violated any provision of this section, the employer shall within thirty days of the finding pay the employee back wages, damages, and the employee's costs and reasonable attorney's fees. Damages shall be calculated as an additional two times the amount of the back wages and in the case of a violation of an anti-retaliation provision an amount set by the state or court sufficient to compensate the employee and deter future violations, but not less than one hundred fifty dollars for each day that the violation continued. Payment under this paragraph shall not be stayed pending any appeal.

Ohio Const. Art. II, Sec. 34a.

4. Representative Young's Question Regarding the Fourteenth Amendment

Finally, we wanted to respond to Representative Young's question regarding the Fourteenth Amendment that he posed during the May 18, 2021 hearing. We take his question to be asking whether the Bill would improperly infringe on a corporation's constitutional rights as outlined in the Fourteenth Amendment.

We believe two fundamental principles apply here.

The first principle is that, while corporations are entitled to some constitutional protections, generally because they are a type of an association of individuals, corporations are not entitled to the full breadth of constitutional protections to which an individual citizen is entitled. *See, e.g., United States v. Sourapas*, 515 F.2d 295, 299 (9th Cir. 1975) (holding that it "is firmly established that a corporation has no fifth amendment protection against self-incrimination...").

The second principle is that corporations are creatures of statutory creation. As such, they offer groups of individuals certain special rights (such as limited liability). In exchange for those privileges, however, corporations are subject to certain restrictions and requirements. This is particularly true for those businesses that either employ people or open their doors to the public.

In these situations, Congress and Ohio have deemed it appropriate to either prohibit corporations from discriminating against various classes of people or mandate that corporations accommodate individuals using the business. Along these lines, we have anti-discrimination laws (such as the Civil Rights Act of 1964 or the Ohio Fair Employment Practices Act) and, particular to our law firm's practice, laws that govern the minimum wage a business may pay to an employee.

An Ohio appellate case is instructive (the emphasis is ours):

It is too well settled for argument that the Legislature is fully empowered to legislate against racial discrimination in places of public accommodation.

* * *

When an owner or proprietor opens up his property or business for use by the public, he subjects it and himself to certain rights in his clients or customers. Ordinarily, the law does not undertake to govern or regulate a citizen in the conduct of his strictly private business. In matters of mere private concern, he is free to deal with whom he pleases. However, there are certain classes of business in the management and conduct of which the general public also has an interest. The plaintiff carries on his business under a license granted him by the state. He has secured to him by the law certain privileges and rights which are not enjoyed by members of the public generally. The power which granted the license represented each member of the public in making the grant, and each member, with reference to those privileges which accrue to the public under it, must be on an equality with every other member. Undoubtedly, the plaintiff can establish reasonable rules and regulations for the conduct of his business. He may also limit his practice to the skill he possesses so long as he does so for reasons applicable alike to all persons regardless of race, color, religion, national origin or ancestry. **But when he accepts the privileges afforded by a public license, he must also accept the obligation to treat all members of the**

granting authority alike. Thereafter, he may not refuse to serve any citizen for any reason which is not applicable alike to all citizens.

Gegner v. Graham, 1 Ohio App. 2d 442, 444–45, 205 N.E.2d 69, 71 (1964).

Undoubtedly, individual Ohioans have a right to bodily autonomy and the right to make the healthcare choices they deem fit. Unfortunately, it has now become apparent that some corporations are willing to intrude upon those rights and threaten either the ability to make a living or the ability to interact and travel normally unless Ohioans submit to the businesses' preferred vaccine regimen. It is incumbent upon this body to prohibit "vaccine passports" from taking root.

We hope that this responds to Representative Young's question. If it does not, we would be happy to consider the question further or examine additional questions he, or others, may have.

5. Conclusion

As advocates for workers, we strongly support Sub H.B. 248. We encourage you to enthusiastically support the stronger substitute bill and continue to fight to protect each Ohioan's right to make his or her own healthcare choices, free from employer, business, and governmental coercion. If you are interested in greater details about how private causes of action and fee shifting provisions empower the free market to protect people's rights, do not hesitate to reach out. We would be happy to discuss this matter further.

Sincerely,



Andrew R. Biller



Andrew P. Kimble

Biller & Kimble, LLC