



BEFORE THE HOUSE HEALTH COMMITTEE  
Opponent Testimony on House Bill 248  
June 22, 2021

Chair Lipps, Vice Chair Holmes, Ranking Member Russo, and members of the House Health Committee, my name is Keith Lake and I am the Vice President of Government Affairs for the Ohio Chamber of Commerce. I am here today to testify in opposition to House Bill 248, legislation that would make sweeping changes to Ohio's vaccination laws.

The Ohio Chamber is the state's leading business advocate, and we represent thousands of companies that do business in Ohio. Our mission is to aggressively champion free enterprise, economic competitiveness and growth for the benefit of all Ohioans.

Last week, you heard and received opponent testimony from a variety of individuals and organizations expressing their concerns about HB 248. Their concerns largely focused on how the bill would put public health in peril due to its broad application to all immunizations, including childhood vaccines, as well as how it has the potential to reverse decades of immunity from life-threatening, but vaccine-preventable, diseases.

One perspective that you didn't hear as much about was the bill's impact on Ohio's business community. That's why I'm here today, to share this perspective for the committee's consideration.

I want to focus on three aspects of the bill that are of concern to the employer community. The first concern is the bill's prohibition on employers mandating, requiring, or otherwise requesting an individual – in other words, an employee – receive a vaccine. The second concern is the bill's prohibition on the ability of employers to make other decisions based on an individual's vaccination status. The third concern is the creation

of a new cause of action that would allow individuals to sue an employer or business alleged to have violated any of the new prohibitions established by HB 248.

The Ohio Chamber has long been an advocate for allowing employers to manage their workplaces free of undue interference from all levels of government. For example, in 2003, when Ohio legalized concealed carry, the Ohio Chamber urged that businesses be granted the right to decide whether to prohibit or allow the carrying of concealed handguns onto their property. The legislation that was passed acknowledged this private property right of businesses, and still today businesses retain this right.

In 2016, when Ohio legalized medical marijuana, the Ohio Chamber urged the legislation include strong protections for employers so that they could maintain safe workplaces, continue to enforce reasonable human resources policies such as drug-free workplace policies, and make it clear that employers are not required to accommodate an employee's use of medical marijuana. The legislation that was passed included such protections.

Also in 2016, when Ohio was considering a law to prevent municipalities from passing ordinances specifying from where pet stores could acquire the pets they sell, the Ohio Chamber urged the legislature to expand the legislation and give private employers the exclusive right to govern matters concerning work hours, location of work, scheduling, and fringe benefits. The legislature agreed, by amending the bill to grant private employers the authority to regulate all of these employment matters.

And when the legislature, in 2017, considered a bill, somewhat analogous to this bill, to prohibit employers from requiring employees receive a flu vaccine, the Ohio Chamber stood opposed. Ultimately, this bill did not become law.

Interestingly, this 2017 bill to prohibit employers from requiring a flu vaccine included this language:

“It is the intent of the general assembly that the prohibition ... shall not be expanded to include vaccination against any disease or illness other than influenza until the overwhelming scientific consensus clearly indicates a present and immediate danger to members of the public who receive the vaccination.”

Should this flu vaccine bill have been enacted, HB 248 would be at odds with its stated legislative intent. More importantly, HB 248 is inconsistent with the legislature's clear intent in all of the precedents I cited: to protect employers' rights to manage their own places of business, and keep the heavy hand of government from interfering. By threatening employers' rights to implement and enforce safety precautions in their workplaces meant to protect their employees, clients, patrons, and others, HB 248 does exactly the opposite. It also upends Ohio's at-will employment doctrine, which allows an employer to terminate an employee at any time for almost any reason – such as an employee's refusal to comply with a vaccination requirement.

Not every employer – in fact, a small minority of employers – have, or likely ever would, require employees to receive a vaccine – a vaccine of any sort – as a condition of employment. However, when they do, it is not done arbitrarily. It is not a decision entered into lightly, as there are a variety of legal factors employers must consider in the context of making workplace vaccinations mandatory.

Though HB 248 is much broader and prohibits mandating individuals receive any vaccine, much of the impetus for the bill clearly stems from the COVID-19 vaccines authorized by the U.S. Food and Drug Administration.

In December, the U.S. Equal Employment Opportunity Commission (EEOC) issued guidance to employers regarding COVID-19 vaccines, specifically. The EEOC, if you're not familiar, is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee.

Per this EEOC guidance, employers may require employees to take the COVID-19 vaccine, but must make exceptions for employees in accordance with Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA) and, for employers in Ohio, the Ohio Civil Rights Act.

This means that, for employees who cannot comply with a vaccine mandate because of a disability, sincerely held religious belief, practice or observance, or pregnancy, employers must provide reasonable accommodations. Potential reasonable accommodations include requiring the unvaccinated employee to:

- Wear a face mask, gloves, or other personal protective equipment at work
- Work at a social distance from co-workers or non-employees
- Work a modified shift

- Get periodic COVID-19 tests
- Work via an approved telework arrangement
- Accept a reassignment

Employers who might require a vaccination must also watch for disparate impact, often referred to as unintentional discrimination. In her sponsor testimony, Rep. Gross shared a story about an employee who was terminated from his job for refusing the COVID-19 vaccine for cultural reasons, and described the individual's reason for declining the vaccine was because of the historical abuse and discrimination of others within the community of color.

It is already unlawful for employers to enact any employment policy, including to apply a vaccination requirement to employees, in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason. Therefore, the EEOC cautions employers who have a mandatory vaccine requirement to consider how such a requirement may disparately impact certain employees based on characteristics protected under federal law, as some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccine than others.

Furthermore, all of the legal guidance surrounding the issue of mandatory vaccines directed at employers that I have seen recommends that, while a vaccine mandate is legally permissible, it is not necessarily the right choice for every employer. However, some employers have determined that requiring employees to be vaccinated is necessary in order to safeguard the health of other employees and their families, clients and visitors, or their communities.

You or I may disagree with an employer's determination that COVID-19 or any other infectious disease poses enough of a risk within that workplace to warrant requiring employees be vaccinated. We're all entitled, of course, to our own opinion on this determination. However, this bill takes the right to make that determination away from the employer, who knows their workplace better than anyone else.

Given the significant legal standards that employers must meet before requiring employees receive a vaccine, the Ohio Chamber believes an outright prohibition is not only an excessive government infringement on employers' rights to manage their workplace, but also unnecessary.

In addition to HB 248 being an attempt to impose a government-knows-best, one-size-fits-all policy on private businesses, the bill also exposes employers to an increased risk of the Occupational Safety and Health Administration (OSHA) levying penalties against them.

The legislation's prohibition on treating individuals differently based upon their vaccination status would prevent businesses from having non-vaccinated employees or customers wear facial coverings, which in turn is problematic because OSHA is currently enforcing the CDC's COVID-19 guidance requiring people who have not yet received the COVID-19 vaccine to wear a facial covering indoors. As a result, if HB 248 were to pass, Ohio employers either risk an OSHA violation and fine if they do not enforce the CDC's COVID-19 policy, or would open themselves up to litigation alleging they violated Ohio law (HB 248) by treating an individual differently based upon their vaccination status.

This places Ohio employers in a no-win situation, and harms Ohio's business climate by increasing the risk of civil and administrative liability for companies across the state.

I also want to expand on my prior statement that HB 248 upends Ohio's at-will employment doctrine. This doctrine is a two-way street. While it allows employers to terminate an employee at any time for almost any reason, it also gives employees the same option: they have the freedom to walk away from a job for any reason – including if that job imposes safety protocols with which they disagree. Ultimately, Ohio's existing at-will employment doctrine already ensures no one can be forced to receive a vaccination they do not want to get. It is perfectly legal for them to refuse, or to make a personal choice to “exercise their beliefs according to the dictates of their conscience,” as Rep. Gross put it in her sponsor testimony.

Lastly, HB 248 would create three new, separate causes of action that individuals can pursue against employers. In other words, three new grounds for filing a lawsuit. As the letter of opposition to HB 248 submitted today by the Ohio Alliance for Civil Justice notes, instead of limiting actions against employers, the bill encourages multiple actions against employers. This is alarming and represents a significant reversal from the General Assembly's efforts, supported strongly by the Ohio Chamber, over the past two decades to rein in frivolous lawsuits and create a common-sense civil justice system that is fair and predictable.

Proponents have called this bill a freedom bill. But what about an employer's freedom to run their business the way they think is best? The Ohio Chamber strongly believes that employers should have the freedom to operate their businesses, to make decisions about protecting their workforce, and to develop the health and safety policies and practices that meet the needs of their individual workplaces. HB 248 infringes on this freedom.

Given this, it is ironic that HB 248 contains language stating that "it is the policy of this state that the success of our state relies largely on the success of the businesses within the state..." Certainly, that's a policy statement with which the Ohio Chamber agrees – and, whether it is the stated policy of the State of Ohio or not, it is a self-evident fact. However, the success of the businesses within the state depends, in part, on having the right to decide the most effective approaches for building and maintaining a healthy workplace, a right taken away from them by HB 248.

Because of this, and the other reasons I've outlined, the Ohio Chamber opposes HB 248, and urges this committee to reject it. Thank you.