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Employers Health

**RE: Opponent Testimony, Ohio House Bill 248: House Health Committee Hearing on August 24, 2021**

Chairman Lipps, Vice-Chair Holmes, Ranking Member Russo and members of the House Health Committee:

I am writing on behalf of Employers Health and its clients. Serving more than 80 large employers in Ohio (for a comprehensive list, please visit [www.employershealthco.com](http://www.employershealthco.com)), we continue to have concerns about the impact of House Bill 248 (HB 248). This bill abrogates employers' rights to provide a safe and healthy workplace, impedes global public health efforts and contradicts numerous sources of federal guidance. We oppose House Bill 248 in its entirety.

**Employers have the freedom to craft their own workplace safety measures.**

As the nation faces an unprecedented public health crisis, employers have been encouraged to go beyond the safety requirements of state and federal laws in order to protect their workers and customers. It is well established that COVID-19 protocols such as social distancing and facial coverings have been indispensable in the reduction of transmission of the virus. As vaccination rates continue to increase, it follows that state and local governments are gradually easing restrictions as we attempt the return to normalcy. Employers are calling employees back to work and their paramount focus remains creating a safe work environment for all of their employees, including vulnerable populations such as those over the age of 65 and those with comorbid medical conditions. Requiring employees to receive a readily available, proven 95% effective COVID-19 vaccination, or at the very least, wear a mask if they choose not to be vaccinated, is a decision within the right of all employers as they reopen and resume normal operation. HB 248 burdens employers by making it harder for them to ensure a safe, secure work environment.



**Employers have a legal obligation to provide a safe workplace for employees and customers.**

Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970,<sup>1</sup> (the General Duty Clause), requires employers to furnish a safe and hazard-free workplace for their employees. In the context of COVID-19, the Occupational Safety and Health Administration (OSHA) has interpreted this clause as necessitating employers to require their employees to wear masks in order to suppress the spread of COVID-19 in the workplace. OSHA guidance tasks employers with identifying COVID-19 exposure risks to employees and aids them in setting appropriate standards that prevent exposure and infection.<sup>2</sup> Requesting that individuals who refuse the COVID-19 vaccine wear facial coverings and/or practice social distancing is a necessary step in carrying out an employer's responsibilities under Section 5. Failure to practice such safety measures could open employers to liability stemming from workplace exposure to the virus. To overcome such liability, employers generally must show that they acted in good faith and in accordance with federal, state and local guidance. If such guidance suggests that unvaccinated individuals are still subject to masking recommendations, employers must be free to rely on this guidance from federal government agencies as they craft return to work policies and procedures.

**Vaccination status is not a protected class under federal or Ohio employment discrimination law.**

Ohio is an at-will employment state. This means that an employee may be terminated for any lawful reason. Termination of an employee for refusing to comply with an employer's vaccine mandate is lawful because vaccine status is not a protected class under the federal or Ohio Civil Rights Act<sup>3</sup> or the Americans with Disabilities Act (ADA).<sup>4</sup> Employees may be entitled to an exemption to the vaccine requirement if an employee has a sincerely held religious belief or practice that prevents him or her from taking the vaccine or if the employee has a disability that prevents him or her from safely taking the vaccine. In the case of either of these situations, the employee may be entitled to a reasonable accommodation. If the employee who is refusing to be vaccinated cannot be reasonably accommodated, the employer is within its rights to terminate the employment relationship. HB 248 impedes this well- established principle of law by preventing an employer from taking any currently legally permissible action against any employee who refuses the vaccine. Moreover, HB 248 makes it unlawful to implement some of

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<sup>1</sup> 29 USC 654(a)(1)

<sup>2</sup> United States Department of Labor, Occupational Safety and Health Administration, (2021). *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace.*

<sup>3</sup> Ohio Rev. Code § 4112.02

<sup>4</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336

the only accommodations available to employers, (i.e., masks, social distancing, telework). HB 248 provides unvaccinated individuals with an outright accommodation and insulation from any action from employers at the expense of the health of all employees and the employer's customers, patients or students. It is within employers' rights to determine lawful terms of employment and implement policies for the good of the workforce.

**HB 248 conflicts with directives issued by federal agencies.**

Under the most recent guidance released by the U.S. Equal Employment Opportunity Commission (EEOC) on May 28, 2021, employers can legally require a COVID-19 vaccination.<sup>5</sup> So long as employers still provide any reasonable accommodations required under the ADA and Title VII, vaccination is a lawful condition of employment. Furthermore, the EEOC has expressly stated that employer inquiries of employee vaccination status are not prohibited medical inquiries with respect to the ADA. If an employee is unable or unwilling to provide proof of vaccination, employers are entitled to rely on federal guidance as they enforce workplace safety policies such as mask wearing or social distancing. HB 248 is in direct conflict with these suggested safety measures provided by the Centers for Disease Control (CDC), EEOC, and OSHA.

**Adequate remedies are available with existing law. HB 248 is unnecessarily overbroad.**

When an employee refuses a COVID-19 vaccination, there are numerous effective mechanisms available to appropriately exempt individuals from vaccination. Employees can object to a vaccination requirement based on a disability, medical contraindication or religious beliefs. Furthermore, Ohio already has a more lenient immunization law than many states as Ohio allows an exemption based "on reasons of conscience."<sup>6</sup> Once a lawful objection is made, the employer must engage in the interactive process to determine if a reasonable accommodation is feasible that does not impose an undue hardship on the employer. According to the EEOC, the following are helpful factors to consider in the undue hardship analysis; number of employees who have received the vaccine at the workplace, amount of the unvaccinated employee's contact with others, the unvaccinated employee's position and the nature of the workforce.

Reasonable accommodations include providing facial coverings and other personal protective equipment, requesting that the employee continue to work remotely, or reassigning the employee to a less populous job site. Thus, many remedies are available in existing law for those who decline vaccination. HB 248 however, gives unvaccinated individuals an unqualified

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<sup>5</sup> U.S. Equal Employment Opportunity Commission, (2021). *What You Should Know About COVID-19 and the ADA, The Rehabilitation Act, and Other EEO Laws.*

<sup>6</sup> Ohio Rev. Code § 3313.671

privilege to return to work and puts the rest of the workforce at greater risk for contracting the virus.

**Employers are not mandating vaccines before return to workplace.**

The vast majority of employers are stopping short of making COVID-19 vaccination a requirement to return to work. Some companies, such as Kroger and Target, are relying on monetary incentives and other perks to encourage otherwise reluctant workers to vaccinate. HB 248 would make it unlawful to provide any type of incentive to vaccinate, request that unvaccinated individuals follow safety procedures and impede nationwide efforts to achieve a critical threshold of vaccinated individuals. Additionally, as most employers are not imposing a mandatory vaccine requirement, HB 248 attempts to combat a moot issue.

**Closing Thoughts**

Under the guise of creating COVID-19 vaccine safeguards, HB 248 upends existing vaccine policies that have protected the public from preventable communicable diseases for decades. Vaccination is an essential component in a multi-layered approach to protect workers and the public at large. There is not a demonstrated pattern of employers taking punitive action against employees simply for not receiving a vaccine. However, HB 248 severely overreaches in prohibiting any type of safety accountability from being placed on those who decline vaccination. As COVID-19 cases are resurging across the country and vaccines continue to drastically reduce transmission, hospitalization and death, now is not the time to pass legislation that impedes this momentum. HB 248 burdens employers and is contrary to employers' rights, legal obligations, and public policy. For these reasons, we strongly oppose House Bill 248.

Sincerely,

A handwritten signature in blue ink that reads "Chris Goff". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Christopher V. Goff, Esq.  
CEO and General Counsel