



www.lsc.ohio.gov

OHIO LEGISLATIVE SERVICE COMMISSION

Office of Research
and Drafting

Legislative Budget
Office

H.B. 218
134th General Assembly

Bill Analysis

[Click here for H.B. 218's Fiscal Note](#)

Version: As Passed by the House

Primary Sponsor: Rep. Cutrona

Paul Luzzi, Attorney

Elizabeth Molnar, Attorney

SUMMARY

Student and employee medical requirements

- Generally prohibits a school, institution of higher education, or employer from requiring a student or employee to receive any of the following that has not been issued a biologics license or otherwise granted full approval by the federal Food and Drug Administration: a vaccine, drug, biological product, or form of genetic immunotherapy that utilizes messenger ribonucleic acid, deoxyribonucleic acid, or other genetic vaccine technology.
- If a school, institution, or employer requires a student or employee to receive such a vaccine, drug, product, or immunotherapy that has been issued a biologics license or is otherwise fully approved, 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.
- Allows 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 prohibition.

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 133rd 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.

TABLE OF CONTENTS

Student and employee medical requirements	3
No FDA approval – prohibition.....	3
Note on full approval, biologics license, and emergency use authorizations.....	4
Licensed or fully approved vaccines, drugs, biological products, and forms of genetic immunotherapy required by schools and employers	4
Exemptions	4
State and federal law relating to discrimination.....	5
Claiming an exemption.....	5

Medical contraindications – bona fide physician-patient relationship.....	5
Natural immunity	6
Reasons of personal conscience.....	6
Confidentiality	7
Participation in K-12 activities.....	7
Costs of mitigation measures.....	7
Collective bargaining.....	7
Employee and student remedies	7
Sunset clause.....	8
Workers’ compensation and employer-mandated medical requirements.....	8
Vaccine passports	9
Emergency medical technicians – COVID-19 tests	9
Qualified civil immunity	10
Severability.....	10

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 certain vaccines, drugs, biological products, or forms of genetic immunotherapy for which the federal Food and Drug Administration (FDA) has not issued biologics licenses or otherwise granted full approval:

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

The bill applies to any vaccine, drug, biological product, or form of genetic immunotherapy that utilizes messenger ribonucleic acid (mRNA), deoxyribonucleic acid (DNA), or other genetic vaccine technology.

However, an employer that conducts research on, develops, handles, administers, transports, or stores infectious organisms as a regular part of its business but is not a hospital may require an employee to receive a vaccine, drug, biological product, or form of genetic

¹ R.C. 3792.05(B) and 3792.07(B).

immunotherapy utilizing mRNA, DNA, or other genetic vaccine technology that has not been issued a biologics license or otherwise granted full approval.²

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.³

In the case of a vaccine, to receive full FDA approval, the vaccine's manufacturer must submit to the FDA a [Biologics License Application](#).⁴ 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.⁵

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.

These 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.

² R.C. 3792.07(F).

³ R.C. 3792.05(B) and 3792.07(B).

⁴ 42 United States Code (U.S.C.) 262.

⁵ 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.

The bill requires an institution of higher education to make a good faith effort to provide equitable instruction and training to a student who refuses a COVID-19 vaccine and who cannot claim an exemption. An employer also must make a good faith effort to provide equitable employment to an employee who refuses a COVID-19 vaccine and who cannot claim an exemption.⁶

State and federal law relating to discrimination

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.⁷ For example, Title VII of the Civil Rights Act of 1964⁸ (Title VII) and the Americans with Disabilities Act⁹ (ADA) are federal laws prohibiting employment discrimination based on an individual's religion and disability, respectively. And the Ohio Civil Rights Law and the rules adopted under it regarding disability and religious discrimination are similar to Title VII and the ADA.¹⁰

Claiming an exemption

In addition to authorizing exemptions, the bill establishes how a student or employee may claim one. With respect to medical contraindications, 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 reasons of personal conscience, including religious convictions, the student or employee must submit a written statement. A student or employee is not required to submit any additional information beyond the written statement to claim either of these exemptions.¹¹

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;

⁶ R.C. 3792.05(C) and (E) and 3792.07(C) and (F).

⁷ R.C. 3792.05 (E) and 3792.07(F).

⁸ 42 U.S.C. 2000e-2.

⁹ 42 U.S.C. 12101 *et seq.*

¹⁰ R.C. 4112.01 and 4112.02, not in the bill; Ohio Administrative Code Chapter 4112.

¹¹ R.C. 3792.05(D) and 3792.07(D).

- 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.¹²

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. The test must be in a form or manner recognized by the medical community. And the results must demonstrate that, at the time of testing, the student or employee 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.¹³

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, institution, 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 for any costs or fees associated with demonstrating natural immunity to the school, institution of higher education, or employer.¹⁴

Reasons of personal conscience

A school, institution of higher education, or employer must honor and accept a 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.¹⁵

¹² R.C. 4731.77.

¹³ R.C. 3792.05(D) and 3792.07(D).

¹⁴ R.C. 3792.05(F) and 3792.07(E).

¹⁵ R.C. 3792.05(D) and 3792.07(D).

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.¹⁶

Participation in K-12 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.¹⁷

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.¹⁸

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.¹⁹

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

¹⁶ R.C. 3792.05(D) and 3792.07(D).

¹⁷ R.C. 3792.05(G).

¹⁸ R.C. 3792.05(F) and 3792.07(E).

¹⁹ R.C. 3792.07(G).

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.²⁰

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.²¹

Sunset clause

The bill sunsets the provisions related to student and employee medical requirements on September 30, 2025.²²

Workers' compensation and employer-mandated medical requirements

The bill expressly provides that an injury covered under the Workers' Compensation Law²³ 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.²⁴

Ohio courts have generally recognized that an employee injured by an employer-mandated vaccine is eligible for compensation and benefits under the law.²⁵ 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 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

²⁰ R.C. 3792.08.

²¹ R.C. 3792.05(H).

²² Section 3.

²³ R.C. Chapters 4121, 4123, 4127, and 4131.

²⁴ R.C. 4123.01.

²⁵ See, e.g., *Spicer Mfg. Co. v. Tucker*, 127 Ohio St. 421 (1934) and *Rolsen v. Walgreen Co.*, 2016-Ohio-8304 (8th Dist. 2016).

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.²⁶

VICP and CICIP 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 CICIP 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.²⁷

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 (1) enters for purposes other than attending a court proceeding or event or (2) receives a service not related to a court proceeding or event.

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.²⁸

Emergency medical technicians – COVID-19 tests

The bill codifies provisions of S.B. 310 from the 133rd General Assembly (expired May 1, 2021) authorizing emergency medical technicians at the basic, intermediate, and paramedic

²⁶ R.C. 4123.87.

²⁷ See Health Resources & Services Administration (HRSA), *National Vaccine Injury Compensation Program*, available [here](#) and HRSA, *Countermeasures Injury Compensation Program*, available [here](#).

²⁸ R.C. 3792.06.

levels who have received proper training to (1) administer COVID-19 tests and (2) collect and label test specimens.²⁹

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 133rd General Assembly (which expired September 30, 2021), that granted immunity for exposure to or transmission or contraction of certain coronaviruses.³⁰ 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 its 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, 2022.³¹

Severability

The bill specifies that its provisions are severable, meaning that if a court holds invalid an item of law or the application of the item to a particular circumstance, the invalidity does not affect other items of law or applications that can be given effect without the invalid item of law or application.³²

²⁹ R.C. 4765.60.

³⁰ Sections 4 and 5.

³¹ Section 6.

³² Section 7.

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.³³
- **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, including a municipal corporation or charter county, 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.³⁴
- **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.³⁵
- **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.³⁶
- **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 policy that mandates COVID-19 vaccinations or periodic testing for unvaccinated employees. 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. On November 16, 2021, OSHA announced that it has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.)³⁷

³³ Ohio Constitution, Article II, Section 28.

³⁴ Ohio Const., art. XVIII, sec. 3.

³⁵ U.S. Constitution, Article I, Section 10; Ohio Const., art. II, sec. 28.

³⁶ 29 U.S.C. 151 *et seq.*

³⁷ 29 Code of Federal Regulations 1910.501, available [here](#); and OSHA, *COVID-19 Vaccination and Testing ETS*, available [here](#).

HISTORY

Action	Date
Introduced	03-16-21
Reported, H. Commerce and Labor	11-18-21
Passed House (58-32)	11-18-21
