

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: HB 1B COVID-19 Mandates
SPONSOR(S): Grall, Massullo and others
TIED BILLS: CS/HB 3B **IDEN./SIM. BILLS:** SB 2-B

FINAL HOUSE FLOOR ACTION: 78 Y's 39 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

HB 1B passed the House on November 17, 2021, and subsequently passed the Senate on November 17, 2021.

Beginning in late 2019, a coronavirus, identified as SARS-CoV-2, caused a pandemic of respiratory illness, called COVID-19, to spread worldwide. COVID-19 can be severe, and has caused millions of deaths around the world, with over 750,000 in the United States (US). It can be spread from person to person and has caused lasting health problems in some who have survived the illness. Vaccinations are now approved for use to prevent COVID-19 infection and vaccination programs are in progress across the US and in many parts of the world.

The states are split on whether the vaccination should be mandated by employers, state and local governments, or schools. Some states and private employers are implementing policies mandating COVID-19 vaccination for employees. Other states are banning vaccination mandates. The Biden administration released the Path Out of the Pandemic COVID-19 Action Plan in September 2021. The plan required several federal agencies to adopt rules requiring certain employers to implement vaccination mandates or to adopt certain other mitigation strategies.

The bill:

- Prohibits private employers from mandating COVID-19 vaccination without providing qualifying employees the ability to opt out of the mandate.
- Allows employees to opt out of an employer's vaccination mandate if they are exempt based on medical, pregnancy, or anticipated pregnancy reasons, religious reasons, COVID-19 immunity, periodic testing or use of employer-provided personal protective equipment. Such exemptions must be submitted to the employer on forms adopted by the Department of Health (DOH).
- Authorizes the Attorney General to receive complaints and impose administrative fines up to \$50,000 per violation, if the employee was terminated for refusing vaccination and the employer failed to follow procedures.
- Prohibits public educational institutions or governmental entities from requiring COVID-19 vaccination as a condition of employment and authorizes DOH to impose a fine not to exceed \$5,000 per violation.
- Specifies that employees improperly terminated on the basis of COVID-19 vaccination refusal may be eligible for reemployment benefits and establishes that reemployment benefits to such employees may not be denied or discontinued based on new job offers that require COVID-19 vaccination.
- Prohibits educational institutions or elected or appointed local officials from mandating COVID-19 vaccination for students, allows parents to bring an action against educational institutions for a declaratory judgement and injunctive relief, and allows prevailing parents to collect attorney fees and court costs.
- Prohibits school boards, school board employees or local officials from requiring students to wear a face mask, face shield, or other face covering; however, maintains a parent's right to allow their child to wear a face covering at school.
- Establishes limitations on quarantining of asymptomatic students and teachers for COVID-19.
- Transfers \$5 million from the General Revenue Fund to the Department of Legal Affairs Operating Trust Fund, and appropriates such funds to investigate complaints and to take legal action to stop the enforcement of vaccination mandates imposed by the federal government.
- Sunsets the above provisions on June 1, 2023.

The fiscal impact of the bill is indeterminate. See FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT.

The bill was approved by the Governor on November 18, 2021, ch. 2021-272, L.O.F., and became effective on that date.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0001Bz.DOCX

DATE: 11/23/2021

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Florida Governmental Agencies

The following Florida agencies have direct roles in the implementation of the bill:

- DOH – DOH is established under s. 20.43, F.S., to “protect and promote the health of all residents and visitors in the state through organized state and community efforts, including cooperative agreements with counties”. The head of DOH is the Surgeon General, also designated as the State Health Officer.¹ DOH also administers state epidemiology functions, and is required to identify, diagnose, and conduct surveillance of diseases and health conditions in the state and accumulate the health statistics necessary to establish trends. As part of those functions, DOH maintains vital statistics and other health data, including vaccination information. Current law also requires DOH to conduct a communicable disease prevention and control program as part of fulfilling its public health mission.²
- The Attorney General (AG) and the Department of Legal Affairs (DLA) –The AG, as the state's chief legal officer, is the head of the Office of the Attorney General (AG's Office), an executive branch agency.³ The AG is tasked with duties prescribed by the state Constitution and those duties appropriate to her office as may be required by law.⁴ The AG is also responsible for overseeing the various prosecutorial and enforcement functions of the Department of Legal Affairs (DLA) within the AG's Office.⁵
- The Department of Economic Opportunity (DEO) – DEO is the agency responsible for administering the Reemployment Assistance (RA) program in Florida.⁶

The Administrative Procedure Act

Each state department, including the AG's Office and its subunits, is an agency subject to the Florida Administrative Procedure Act (APA),⁷ which is codified in ch. 120, F.S., and provides comprehensive, standardized procedures for executive branch agency action.⁸ Such agency action may include promulgation of a rule or issuance of an order; a denial of a petition to adopt a rule or issue an order; a denial of a request for the minimum public information the APA requires to be available; and final agency action, which is also subject to judicial review.⁹

COVID-19 Vaccination

In response to the COVID-19 pandemic President Trump declared COVID-19 a National Emergency,¹⁰ and later released a Vaccine Distribution Plan by the US Department of Health and Human Services

¹ S. 20.43, F.S.

² S. 381.003, F.S. A communicable disease is any disease caused by transmission of a specific infectious agent, or its toxic products, from an infected person, an infected animal, or the environment to a susceptible host, either directly or indirectly.

³ Art. IV, s. 4, Fla. Const.; Office of Program Policy Analysis and Government Accountability, *State of Florida Organizational Chart*, <https://oppaga.fl.gov/ProgramSummary/OrgChart> (last visited Nov. 8, 2021).

⁴ *Id.*; s. 16.01(2), F.S.

⁵ S. 16.015, F.S.

⁶ Ss. 20.60(5)(c)(3) and 443.171, F.S.

⁷ S. 120.52(1), F.S.

⁸ The Joint Administrative Procedures Committee, *A Primer on Florida's Administrative Procedures Act*, <https://www.japc.state.fl.us/Documents/Publications/PocketGuideFloridaAPA.pdf> (last visited Nov. 8, 2021).

⁹ *Id.*; see s. 120.52(2), F.S.; s. 120.68, F.S. (judicial review).

¹⁰ American Journal of Managed Care, *A Timeline of COVID-19 Developments in 2020*, <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020> (last visited Nov. 6, 2021).

(HHS) and the US Department of Defense (DOD) that planned to make COVID-19 vaccination free for all Americans.¹¹

Vaccines contain weakened or inactive parts of a particular organism (antigen) that triggers an immune response within the body. Newer vaccines contain the blueprint for producing antigens rather than the antigen itself. Neither the antigen nor the blueprint infects the person receiving the vaccine; rather, they teach the immune system to respond much as it would have on its first reaction to the actual pathogen.¹² Sufficient vaccination rates achieve population immunity and eventually can end a pandemic.¹³

In 2020, the federal Food and Drug Administration (FDA) issued an Emergency Use Authorization (EUA)¹⁴ for COVID-19 vaccines by Pfizer/BioNTech and Moderna;¹⁵ the EUA for the J&J/Janssen vaccine was issued in 2021.¹⁶ The FDA issued full approval for the Pfizer vaccine in August, 2021.¹⁷ Moderna completed approval submissions in August, 2021, and is still pending full approval.

In the US, approximately 58 percent of the population are fully vaccinated; approximately 60 percent of Floridians are fully vaccinated.¹⁸

The federal Centers for Disease Control and Prevention (CDC) makes non-mandatory immunization recommendations for both adults and children. The CDC has added COVID-19 vaccinations to the recommended immunization schedule for adults; it has not added them to the recommended schedule for children.¹⁹

Current Florida law requires children to receive certain vaccinations prior to school entry or attendance, in accord with the CDC recommendations for childhood vaccinations.²⁰ Florida also requires meningococcal meningitis and hepatitis B vaccinations for students residing in on-campus housing of a postsecondary educational institution.²¹ Other than this, current Florida law does not require any vaccination for an adult, or mandatory vaccination in any other setting.

¹¹ US Department of Defense, Trump Administration Releases COVID-19 Vaccine Distribution Strategy, Sep. 16, 2020, <https://www.defense.gov/News/Releases/Release/Article/2349357/trump-administration-releases-covid-19-vaccine-distribution-strategy/> (last visited Nov. 10, 2021).

¹² World Health Organization, *How Do Vaccines Work?* (Dec. 8, 2020), <https://www.who.int/news-room/feature-stories/detail/how-do-vaccines-work> (last visited Nov. 8, 2021).

¹³ Herd immunity occurs when a large portion of a community (the herd) becomes immune to a disease, making the spread of disease from person to person unlikely. Centers for Disease Control and Prevention, <https://www.cdc.gov/vaccines/parents/why-vaccinate/index.html> (last visited Nov. 8, 2021).

¹⁴ US Food and Drug Administration, *Emergency Use Authorization*, <https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization> (last visited Nov. 8, 2021). Medical countermeasures are FDA-regulated products (biologics, drugs, and devices) that may be used in the event of a public health emergency. A determination that a public health emergency exists is insufficient to enable the FDA to issue EUAs; *See* 21 U.S.C. § 360bbb-3; EUA allows the FDA to facilitate the availability and use of medical countermeasures during public health emergencies.

¹⁵ US Centers for Disease Control and Prevention, [How CDC Is Making COVID-19 Vaccine Recommendations | CDC](#) (last visited Nov. 11, 2021).

¹⁶ US Food and Drug Administration, [Janssen COVID-19 Vaccine | FDA](#) (last visited Nov. 11, 2021).

¹⁷ US Food and Drug Administration, [FDA Approves First COVID-19 Vaccine | FDA](#) (last visited Nov. 11, 2021).

¹⁸ US Centers for Disease Control and Prevention, *COVID Data Tracker*, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited on Nov. 6, 2021).

¹⁹ US Centers for Disease Control and Prevention, *Vaccines for COVID-19*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/index.html> (last visited Nov. 1, 2021). Only the Pfizer vaccine is approved for children, and only for children age 5 and over. CDC, *COVID-19 Vaccines for Children and Teens*, [COVID-19 Vaccines for Children and Teens | CDC](#) (last visited Nov. 11, 2021).

²⁰ S. 1003.22, F.S. Parents have the ability to opt out of child vaccination for documented medical reasons, for religious reasons, or for other good cause.

²¹ S. 1006.69, F.S. A student or the parent of a minor who is required to have such vaccines, may refuse by signing a waiver for each vaccine.

Vaccination Requirements by Businesses for Employees

Since the FDA's full approval of COVID-19 vaccinations, some employers have begun to mandate vaccination.²² A recent survey²³ of over 1,000 large employers indicates that 59 percent of businesses track vaccination status and 52 percent say they plan to require vaccination by the end of the year (2021). Twenty-one percent now require vaccinations. Thus, a majority of businesses surveyed have indicated that they plan to implement a vaccination mandate.²⁴ In another survey, 47 percent would prefer a government entity to make the decision for them by either mandating employee vaccination or prohibiting vaccine documentation for employment.²⁵

Many state and local governments and businesses that have COVID-19 vaccination mandates in place provide opt-outs for people who agree to testing instead. These mandates require workers who remain unvaccinated to regularly produce a negative test result in order to work and provide paid time off to workers who decide to be vaccinated so they can recover from short-term side effects from the vaccination. In addition, some of these policies provide limited exceptions for disability and religious reasons.²⁶ For example, the COVID-19 vaccination agreement between Walt Disney World and members of the service Trades Council Union, which represents 30,000 workers at the Florida theme park resort, establishes "a process to address requests for an accommodation related to the required COVID-19 vaccination due to a disability or medical condition or a sincerely held religious belief, practice or observance."²⁷

Nine states have passed laws that ban certain employers from mandating vaccines for workers. Some of these states only ban state entities from requiring state employees to be vaccinated.²⁸ For example, Arizona's ban applies to all employers except healthcare. The governor's executive order allows, but does not mandate, healthcare institutions to require vaccinations. However, they must provide "reasonable accommodation" for any who are unvaccinated. The executive order also bans vaccine passports.²⁹

Montana's ban applies to all employers except healthcare. Montana permits healthcare institutions to ask employees to voluntarily share their status or assume that anyone who does not share their status is unvaccinated, and requires "reasonable accommodation" be provided for anyone who is unvaccinated. Montana also bans vaccine passports.³⁰

Florida COVID-19 Vaccination Mandates

²² Scott Horsley, *With FDA Approval Of Pfizer, More Employers May Require COVID Vaccinations*, NPR (Aug. 23, 2021) <https://www.npr.org/2021/08/23/1030430485/with-the-fda-approval-employers-can-now-require-vaccination-against-covid> (last visited Nov. 9, 2021); Aldo Svaldi, *Employers' vaccine mandates strengthened by full FDA approval*, Denver Post (Aug. 24, 2021) <https://www.denverpost.com/2021/08/24/fda-approval-covid-19-vaccination-mandates/> (last visited Nov. 8, 2021).

²³ Littler Mendelson Workforce Policy Institute, *Littler Survey: Employers Increasingly Consider Vaccine Mandates as COVID-19 Delta Variant Spreads*, Press Release (Aug. 23, 2021), <https://www.littler.com/publication-press/press/littler-survey-employers-increasingly-consider-vaccine-mandates-covid-19> (last visited Nov. 8, 2021).

²⁴ Catherine Thorbecke, *Majority of companies plan to have COVID-19 vaccine mandate, survey finds*, ABC NEWS (Sep. 1, 2021), <https://abcnews.go.com/Business/majority-companies-plan-covid-19-vaccine-mandate-survey/story?id=79765288> (last visited Nov. 8, 2021). 80 percent of such employers require employees to be masked.

²⁵ Littler, *Littler COVID-19 Vaccine Employer Survey Report*, (Feb. 2021), <https://aboutblaw.com/VwA> (last visited Oct. 29, 2021).

²⁶ National Academy for State Health Policy, *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, <https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/> (last visited Nov. 8, 2021).

²⁷ Walt Disney World Parks & Resorts and Service Trades Council Union, *Memorandum of Understanding 2021 Walt Disney Parks & Resorts US and Service Trades Council Union Mandatory COVID-19 Vaccinations*, <https://www.unitehereocal362.org/wp-content/uploads/Executed-Final-STCU-MOU-Mandatory-COVID-19-Vaccinations-8.23.21.pdf> (last visited Oct. 29, 2021).

²⁸ NASHP, *supra* note 26.

²⁹ Arizona Governor Douglas A. Doucey, *Executive Order No. 2021-18*, Aug. 16, 2021, https://azgovernor.gov/sites/default/files/eo_2021-18.pdf (last visited Oct. 29, 2021).

³⁰ US News & World Report, *The Latest: Governor Bans Vaccine Passports for Montana*, <https://www.usnews.com/news/world/articles/2021-04-13/the-latest-britain-meets-target-on-jabs-for-over-50s> (last visited Nov. 1, 2021).

On April 2, 2021, Governor DeSantis issued an executive order prohibiting businesses in Florida from requiring patrons or customers to provide proof of COVID-19 vaccination or recovery as a condition to receiving services from the business.³¹

In addition, on July 1, 2021, the Governor approved SB 2006 (HB 7047), which applied the same prohibition to all business entities, enforceable by a fine up to \$5,000 per violation.³² The bill prohibited “business entities operating in this state from requiring patrons or customers to provide any documentation certifying COVID-19 vaccination or post-infection recovery to gain access to, entry upon, or service from the business operations in this state.”³³

On July 13, 2021, several cruise lines sued the Surgeon General for a preliminary injunction against enforcement of the statutory vaccination mandate ban for cruise lines that want to require all passengers to provide proof of vaccination.³⁴ On August 8, 2021, the US District Court of the Southern District of Florida granted an injunction against enforcement of the statutory vaccination mandate ban for cruise lines. The court found that the law’s prohibition against such a requirement is likely to be found unconstitutional as an impermissible restriction on free speech.

Government Authority Related to COVID-19 Vaccination Mandates

The federal government is limited to exercising only the powers enumerated by the US Constitution.³⁵ State governments, on the other hand, exercise the broad powers that are neither delegated to the federal government nor prohibited from the states by the Constitution. Thus, each state exercises a broad, general "police power" to enact laws protecting life, health, morals, comfort, and the general welfare.³⁶

Under the American system of federalism, states share regulatory authority with the federal government over public health matters. States traditionally exercise the bulk of the authority in this area pursuant to their general police powers.³⁷ The Tenth Amendment to the US Constitution dictates that the powers not delegated to the federal government by the Constitution are reserved to the states or the people.

In 1905, the US Supreme Court upheld, as a constitutional exercise of the state’s police power, a state law and a local ordinance requiring that each resident of Cambridge, Massachusetts must either be vaccinated against smallpox or pay a \$5 fine (equivalent to about \$150 today).³⁸

Occupational Safety and Health Administration (OSHA) Vaccination Policy

Section 6 of the Occupational Safety and Health Act of 1970 (OSH Act)³⁹ grants OSHA of the Department of Labor the authority to promulgate, modify, or revoke occupational safety and health standards that apply to private sector employers, the US Postal Service, and the federal government.⁴⁰

OSHA has the authority to enforce employer compliance with its standards and with its general duty clause through the issuance of abatement orders, citations, and civil monetary penalties. The OSH Act

³¹ Fla. Exec. Order 21-81 (Apr.2, 2021).

³² Ch. 2021-8, Laws of Fla.

³³ S. 381.00316, F.S.

³⁴ *Norwegian Cruise Line Holdings, LTD., v. Rivkees, M.D.*, 2021 WL 3471585 (S.D. Fla. 2021).

³⁵ *See Kansas v. Colorado*, 206 US 46 (1907).

³⁶ *See Carroll v. State*, 361 So. 2d 144, 146 (Fla. 1978).

³⁷ Congressional Research Service, *State and Federal Authority to Mandate COVID-19 Vaccination*, <https://crsreports.congress.gov/product/pdf/R/R46745> (last visited Nov. 9, 2021).

³⁸ *Jacobson v. Massachusetts*, 197 US 11 (1905).

³⁹ Occupational Safety and Health Act of 1970 (OSH Act), (29 U.S.C. §651 et seq.; 29 C.F.R. Parts 1900 to 2400), <https://www.osha.gov/laws-regs/oshact/completeoshact>.

⁴⁰ 29 U.S.C. §655. The provisions of the OSH Act are extended to the legislative branch as an employer by the Congressional Accountability Act (P.L. 104-1).

does not cover state or local government agencies or units. Thus, certain entities that may be affected by COVID-19, such as state and local government hospitals, local fire departments and emergency medical services, state prisons and county jails, and public schools, are not covered by the OSH Act or subject to OSHA regulation or enforcement.⁴¹

Section 18 of the OSH Act authorizes states to establish their own occupational safety and health plans and preempt standards established and enforced by OSHA.⁴² In order to do so, states must submit an individual state plan for OSHA's approval. OSHA must approve state plans if they are "at least as effective" as OSHA's standards and enforcement. If a state adopts a state plan, it must also cover state and local government entities, such as public schools, not covered by OSHA.

Currently, 21 states and Puerto Rico have state plans that cover all employers, and five states and the US Virgin Islands have state plans that cover only state and local government employers not covered by the OSH Act.⁴³ In the remaining states, state and local government employers are not covered by OSHA standards or enforcement. State plans may incorporate OSHA standards by reference, or states may adopt their own standards that are at least as effective as OSHA's standards. State plans do not have jurisdiction over federal agencies and generally do not cover maritime workers and private sector workers at military bases or other federal facilities.⁴⁴

Florida is under federal OSHA jurisdiction, which covers most private sector workers within the state but not state and local government workers.⁴⁵ DOH manages the Occupational Health and Safety Program, which only gathers information and generates reports for the state of Florida.⁴⁶

Emergency Temporary Standards (ETS)

Section 6(c) of the OSH Act provides the authority for OSHA to issue an ETS without having to go through the normal rulemaking process. OSHA may promulgate an ETS without supplying any notice or opportunity for public comment or public hearings. An ETS is immediately effective upon publication in the Federal Register. Upon promulgation, OSHA is required to begin the full rulemaking process for a permanent standard with the ETS serving as the proposed standard for rulemaking. An ETS is valid until superseded by a permanent standard, which OSHA must promulgate within six months of publishing in the Federal Register. An ETS must include a statement of reasons for the action in the same manner as required for a permanent standard.⁴⁷ The validity of an ETS may be challenged in an appropriate US Court of Appeals.⁴⁸

Section 6(c)(1) of the OSH Act requires that both of the following determinations be made in order for OSHA to promulgate an ETS:

- That employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards; and
- That the emergency standard is necessary to protect employees from such danger.⁴⁹

⁴¹ Congressional Research Service, *Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19*, <https://crsreports.congress.gov/product/pdf/R/R46288> (last visited Oct. 29, 2021).

⁴² 29 U.S.C. §667.

⁴³ US Department of Labor, OSHA, *Occupational Safety and Health Administration State Plans*, <https://www.osha.gov/stateplans/> (last visited Oct. 29, 2021).

⁴⁴ CRS, *supra* note 41.

⁴⁵ USDOL, *supra* note 43.

⁴⁶ Florida Department of Health, Florida Occupational Health and Safety Program, <http://www.floridahealth.gov/environmental-health/occupational-health-surveillance/documents/program-intro-factsheet.pdf> (last visited Oct. 29, 2021).

⁴⁷ CRS, *supra* note 41. State plans are required to adopt or adhere to an ETS, although the OSH Act is not clear on how quickly a state plan must come into compliance with an ETS.

⁴⁸ Occupational Safety and Health Act of 1970 (OSH Act), (29 U.S.C. §651 et seq.; 29 C.F.R. Parts 1900 to 2400).

⁴⁹ CRS, *supra* note 41.

OSHA has not previously issued extensive vaccination mandates impacting employers. However, on June 21, 2021, OSHA promulgated an ETS for the prevention of COVID-19 in health care employment.⁵⁰ The health care employment ETS requires a covered health care employer to create a COVID-19 plan, includes provisions for the prevention of COVID-19 in the workplace, requires new recordkeeping in COVID-19 cases, and in certain circumstances, permits employers to forgo the medical evaluation and fit-testing requirements of the OSHA respiratory protection standard.⁵¹

Aside from the COVID-19 vaccine, OSHA has issued workplace standards for the Hepatitis B (Hep B) vaccine, but did not mandate its use. Rather, under OSHA's Bloodborne Pathogens Standard, employers with workers who may be exposed to blood or other infectious materials must make free Hep B vaccinations available to their employees. If employees choose not to receive the Hep B vaccine, they may be obliged to execute a form acknowledging their abstention.⁵²

OSHA COVID-19 ETS

In September 2021, the Biden Administration (Administration) released the "Path Out of the Pandemic COVID-19 Action Plan." The plan required OSHA to issue an ETS requiring covered businesses to mandate that their workers be vaccinated against the coronavirus or undergo weekly testing. The President also signed additional executive orders stipulating that most federal employees and federal contractors,⁵³ as well as most health care workers,⁵⁴ be vaccinated against COVID-19.⁵⁵

On November 4, 2021, OSHA issued its COVID-19 Vaccination and Testing; Emergency Temporary Standards (OSHA ETS), along with a number of Fact Sheets, FAQs, and templates for a mandatory vaccination policy, and a vaccination, testing, and face covering policy. The OSHA ETS was published in the Federal Register on November 5, 2021.⁵⁶

In summary, the OSHA ETS requires all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result at least weekly and wear a mask. These employers are also required to provide paid time off to workers who decide to be vaccinated so they can recover in the event of experiencing any short-term side effects from the vaccination. The OSHA ETS provides penalties of up to \$14,000 per violation. According to the Administration, the requirement will impact over 80 million workers in private sector businesses with 100 or more employees.⁵⁷

The OSHA ETS is effective November 5, 2021, and a number of requirements must be met by the employer within 30 days from the effective date:⁵⁸

- Establish a policy on vaccination, determine the vaccine status of employees, obtain acceptable proof of vaccination, maintain such records and a roster of vaccination status;
- Provide support (paid time off) for employees to start getting vaccinated;

⁵⁰ Occupational Exposure to COVID-19; Emergency Temporary Standard, 86 Fed.Reg. 32376 (June 21, 2021). The OSHA ETS consists of 490 pages, but only the last 18 pages contain the actual OSHA rules.

⁵¹ CRS, *supra* note 41.

⁵² US Department of Labor, OSHA, *OSHA FactSheet Hepatitis B Vaccination Protection*, <https://www.osha.gov/sites/default/files/publications/bbfact05.pdf> (last visited Oct. 29, 2021).

⁵³ The White House, *Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors*, Sep. 09, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/> (last visited Oct. 29, 2021).

⁵⁴ The White House, *Executive Order on Protecting Worker Health and Safety*, Jan. 21, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/> (Last visited Oct. 29, 2021).

⁵⁵ The White House, *Path Out of the Pandemic Plan*, <https://www.whitehouse.gov/covidplan/> (last visited Oct. 29, 2021).

⁵⁶ COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, <https://www.federalregister.gov/d/2021-23643>

⁵⁷ The White House, *Path Out of the Pandemic: President Biden's COVID-19 Action Plan*, (Sep. 2021), <https://www.vsba.org/wp-content/uploads/2021/09/Path-out-of-the-Pandemic-POTUS-COVID-19-Action-Plan.pdf> (last visited Oct. 29, 2021).

⁵⁸ US Department of Labor, OSHA, *Protecting Workers*, <https://www.osha.gov/coronavirus/safework#executive-summary>

- Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes; and
- Provide employees information about the OSHA ETS, workplace policies and procedures, vaccination efficacy, safety and benefits, protection from retaliation and discrimination, and the laws that provide for criminal penalties for knowingly supplying false documentation.

Within 60 days from the effective date, employers must ensure employees are fully vaccinated or for those employees who are not fully vaccinated, ensure that they are tested for COVID-19 at least weekly (if in the workplace at least once a week) or within seven days before returning to work (if away from the workplace for a week or longer).

States with OSHA-approved State Plans have 30 days from November 5, 2021, to either amend their standards to be identical to or “at least as effective as” the new OSHA ETS, or show that an existing State Plan standard covering this policy is already as effective.⁵⁹ The State Plan standard must remain in effect for the duration of the federal OSHA ETS.

If the employer has fewer than 100 employees on the effective date of the OSHA ETS, but later has the 100 or more employees, the employer is expected to come into compliance with the standards. Once an employer has come within the scope of the OSHA ETS, the standard continues to apply for the remainder of the time the standard is in effect, regardless of fluctuations in the size of the employer’s workforce. The employee count is completed by the employer at the firm or corporate-wide level, not the individual location level. Therefore, for a single corporate entity with multiple locations, all employees at all locations are counted.

The following workers count toward the 100-employee threshold: Part-time employees; direct hire temporary and seasonal employees (those not obtained from a temporary staffing agency); employees who are minors; employees working exclusively outdoors; and employees working from home. However, the following workers are not counted toward the 100-employee threshold: Independent contractors; and employees placed at a host employer location by a staff agency (which are not counted for the host employee 100-employee threshold).

Employers must implement a vaccination policy but are permitted to implement a partial policy that requires vaccination for employees that provide services directly to members of the public, but allows remaining employees the choice of vaccination or testing. The OSHA website contains a “Mandatory Vaccination Policy” Template and an alternative “COVID-19 Vaccination, Testing and Face Covering Policy” Template that covered employers can use for compliance with the OSHA ETS.⁶⁰

Employer policies should address all the applicable requirements in the OSHA ETS, including:

- Requirements for COVID-19 vaccination;
- Applicable exclusions from the written policy (e.g., medical contraindications, medical necessity requiring delay in vaccination, or reasonable accommodations for workers with disabilities or sincerely held religious beliefs);
- Determining an employee’s vaccination status and how this information will be collected;
- Paid time and sick leave for vaccination purposes;
- Notification of positive COVID-19 tests and removal of COVID-19 positive employees from the workplace;
- Providing information to employees; and
- Disciplinary actions for employees who do not abide by the policy.

The employer must require each vaccinated employee to provide acceptable proof of vaccination status, including whether they are fully or partially vaccinated. Acceptable documentation for proof of vaccination includes: the record of immunization from a health care provider or pharmacy; a copy of the

⁵⁹ 29 C.F.R. § 1953.5(b).

⁶⁰ US Department of Labor, OSHA, *Sample Mandatory Vaccination Policy*, <https://www.osha.gov/sites/default/files/covid-19-ets2-sample-mandatory-vaccination-policy.docx> (last visited Nov. 10, 2021).

US COVID-19 Vaccination Record Card; a copy of medical records documenting the vaccination; a copy of immunization records from a public health, state, or tribal immunization information system; or a copy of any other official documentation that contains the type of vaccine administered, date of administration, and the name of the health care professional or clinic site administering the vaccine.

An employee who does not possess a COVID-19 vaccination record (e.g., because it was lost or stolen) should contact the vaccination provider (e.g., local pharmacy, or physician office) to obtain a new copy, or utilize the state health department's immunization information system. In instances where an employee is unable to produce acceptable proof of vaccination listed above, a signed and dated statement by the employee will be acceptable.

The employee's statement must:

- Attest to his or her vaccination status (fully vaccinated or partially vaccinated);
- Attest that he or she has lost or is otherwise unable to produce proof required by this section;
- Include the following language: "I declare (or certify, verify, or state) that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties."⁶¹

To ensure employees are aware of potential consequences associated with providing false information when complying with the standard, the OSHA ETS requires employers to provide each employee with information regarding the prohibitions of 18 U.S.C. § 1001 and Section 17(g) of the OSH Act, which provide criminal penalties associated with knowingly supplying false statements or documentation.

Employers are required to provide reasonable off time for each employee during work hours for each of the employee's primary vaccination dose(s), including up to four hours of paid time, at the employee's regular rate of pay. An employer may require an employee to use paid sick leave or paid time off (PTO) when recovering from side effects experienced following a vaccination dose. Employers may set a cap on the amount of paid sick leave/PTO available to employees to recover from any side effects, but the cap must be reasonable. Employers are not obligated by the OSHA ETS to reimburse employees for transportation costs (e.g., gas money, train/bus fare, etc.) incurred to receive the vaccination.

According to the OSHA ETS, if an employer has unvaccinated workers in the workplace, those employees will be required to have weekly tests until they are fully vaccinated or the OSHA ETS is no longer in effect. The test used must be a test for SARS-CoV-2 that is cleared, approved, or authorized, including in an EUA, by the FDA to detect current infection with the SARS-CoV-2 virus (e.g., a viral test) and administered in accordance with the authorized instructions; and not both self-administered and self-read unless observed by the employer or an authorized telehealth proctor. The OSHA ETS does not require employers to pay for any costs associated with testing.

While the OSHA ETS requires weekly COVID-19 testing of all unvaccinated employees, if testing for COVID-19 conflicts with a worker's sincerely held religious belief, practice, or observance, the worker may be entitled to a reasonable accommodation.

The OSHA ETS requires unvaccinated employees to wear a face covering when indoors and when occupying a vehicle with another person for work purposes, and unvaccinated employees who work remotely do not need to submit to weekly COVID-19 testing. For unvaccinated employees who come into the workplace at least once a month, the employer must ensure the employee is tested for COVID-19 within seven days prior to returning to the workplace and provides documentation of that test result to the employer upon return to the workplace.

In addition, there are other topics covered in the OSHA ETS including notification, removal from the workplace, requirements for positive COVID-19 test results; what is a face covering and certain exceptions to wearing face coverings; reporting COVID-19 fatalities and hospitalizations to OSHA; and recordkeeping obligations under the OSHA ETS.

⁶¹ Employees should also include in their statement, to the best of their recollection, the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s) to be acceptable.

Some business leaders are reviewing the details of OSHA's OSHA ETS before making changes to their policies. Other executives have extended their remote-work policies to give themselves time to review the ETS. Some smaller employers are concerned about the cost and other compliance burdens that the new rule will impose, and at least one small-business advocacy group is planning to file a legal challenge. According to a survey of human resource leaders, 46 percent of respondents said they plan to require employees to be vaccinated in locations that allow such policies. However, more than 33 percent of respondents said they remain unsure about their vaccination plans.⁶²

OSHA ETS Stayed by Court of Appeal

Challenges to the new OSHA ETS and applications for a stay on its enforcement were brought in almost every federal circuit in the US. On November 6, 2021, a panel of the US Court of Appeal for the Fifth Circuit granted a nationwide stay of the OSHA ETS pending further action of that court, because the "petitions give cause to believe there are grave statutory and constitutional issues with the mandate." On November 12th, the Fifth Circuit reaffirmed the initial stay finding that the OSHA ETS was "overbroad" and "flawed," and determined that it exceeded OSHA's statutory authority.⁶³ On November 16th, this case, and all of the other cases pending in different circuits, were consolidated and transferred to the Sixth Circuit Court of Appeal,⁶⁴ which was randomly chosen by the judicial panel on multidistrict litigation.⁶⁵ The Sixth Circuit has the authority to modify, rescind, or leave in place the stay issued by the Fifth Circuit.⁶⁶ For now, OSHA has suspended enforcement and implementation activities regarding the ETS pending further development in the litigation.⁶⁷

Federal Contractor Vaccination Requirements

On September 9, 2021, the President signed an executive order requiring most federal employees and federal contractors to get the COVID-19 vaccine, removing the option for them to instead undergo regular testing. President Biden issued an Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors that requires executive departments and agencies to "include a clause" in certain federal contracts and subcontracts mandating compliance "with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force."⁶⁸ The White House issued guidance and an order imposing three specific requirements on covered federal contractors and subcontractors. First, covered entities must ensure that their covered employees are vaccinated against COVID-19. Unlike OSHA's COVID-19 ETS, these entities are not allowed to avoid mandating vaccinations if they regularly obtain negative tests from employees. Second, covered entities must ensure that employees satisfy certain new requirements with respect to wearing masks and physically distancing when working at covered workplaces. Finally, certain procedural requirements are imposed requiring covered entities to designate a specific official to oversee COVID safety protocols at covered workplaces.⁶⁹

⁶² Society for Human Resource Management, *OSHA Sends COVID-19 Vaccination Rule to White House for Review* (Oct. 13, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/osha-sends-covid-19-vaccination-rule-to-white-house-for-review.aspx> (last visited Oct. 29, 2021).

⁶³ National Law Review, *Fifth Circuit Hits Pause on OSHA COVID-19 Vaccine or Testing Emergency Standard*, <https://www.natlawreview.com/article/fifth-circuit-hits-pause-osha-covid-19-vaccine-or-testing-emergency-standard>

⁶⁴ The 6th Circuit hears cases from federal district courts in Kentucky, Michigan, Ohio, and Tennessee.

⁶⁵ 28 U.S.C. § 2112(a)(3). The judicial panel consists of seven circuit and district judges from different circuits designated by Chief Justice of the United States John Roberts. See 28 U.S.C. § 1407(d).

⁶⁶ Consolidation Order, *In Re: Occupational Safety and Health Agency, Interim Final Rule: COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61402, Issued On November 4, 2021, MCP No. 165, J.P.M.L. (November 16, 2021).

⁶⁷ US Dept. of Labor, OSHA, *COVID-19 Vaccination and Testing ETS*, <https://www.osha.gov/coronavirus/ets2>; See Also, JDSupra, *Navigating the Uncertainties of the ETS: What Employers Should Do Now*, <https://www.jdsupra.com/legalnews/navigating-the-uncertainties-of-the-ets-4266782/>

⁶⁸ The White House, *New Guidance on COVID-19 Workplace Safety for Federal Contractors*,

<https://www.whitehouse.gov/omb/briefing-room/2021/09/24/new-guidance-on-covid-19-workplace-safety-for-federal-contractors/>

⁶⁹ *Id.*

Coverage and Timing

The White House and its Task Force drafted the guidance so that it covers all prime federal contractors and any subcontractors (of any tier), where that entity either (a) enters into a new contract on or after November 14 to provide services to the federal government, (b) enters into such a contract between October 15 and November 13 where the agency elects to apply the obligations, or (c) after October 15, extends or renews a contract for services to the federal government.⁷⁰ Thus, contracts that were entered into before October 15 (and not extended or renewed after that date), are not directly covered. Other contracts are not covered such as those with subcontractors who simply provide products and those valued below the “simplified acquisition threshold” that is generally set at \$250,000.⁷¹

The vaccination requirements apply to any employee of a covered entity so long as the employee is working full-time or part-time either (a) in connection with a covered contract or (b) at a covered contractor workplace, which is defined broadly to include almost any location controlled by the contractor that has any connection to a covered contract.

There are no exceptions to the vaccination requirements for remote employees. However, because an employee’s home is not a covered contractor workplace, an employee is not required to follow the additional masking and social distancing requirements when working from home.

Finally, contractors have until January 18, 2022, to be vaccinated against COVID-19, although the guidance previously indicated contractors had until December 8.⁷² The White House has provided for exceptions that will allow employers to provide legally required disability and religious accommodations.⁷³ The guidance indicates that requests for “medical accommodation” or “medical exceptions” should be treated as requests for a disability accommodation.

Litigation

Several states have filed lawsuits challenging the validity of the federal contractor vaccine mandate.

Florida⁷⁴ has filed one such lawsuit that alleges the vaccine requirement interferes with its employment policies, threatens economic harm, and is unlawful because it:

- Is arbitrary and capricious;
- Was issued without the notice of rulemaking and a comment period required by federal law; and
- Is based on a unconstitutional delegation of legislative power and exercise of spending power, and on an underlying Executive Order issued without authority.

Florida asks the court to set aside the President’s executive order, rules, and guidance establishing the contractor vaccine requirements, to preliminarily and permanently enjoin enforcement, and to declare the defendants’ actions unlawful. The court required the defendants’ response to the state’s motion for preliminary injunction by November 17, and any reply brief by November 29. A hearing on the motion is set for December 7.

⁷⁰ *Id.*

⁷¹ Squire Patton Boggs, Employment Law Worldview, *Federal Contractors and Subcontractors: White House Clarifies New Vaccination and Safety Requirements (US)*, <https://www.employmentlawworldview.com/federal-contractors-and-subcontractors-white-house-clarifies-new-vaccination-and-safety-requirements-us/> (last visited Nov. 8, 2021).

⁷² *Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis*, 86 Fed. Reg. 63,418, 63,420 (Nov. 16, 2021)(addressing Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, updated Nov. 10, 2021).

⁷³ Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, Issued September 24, 2021*, https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf

⁷⁴ *Florida v. Bill Nelson, et al.*, No. 21-2524 (M.D. Fla. filed on October 28, 2021).

Numerous other states have filed suits in various district courts across the country challenging the federal vaccination mandate.⁷⁵ Motions for preliminary injunction are pending rulings in these cases. At least one US District Court has denied such motion.⁷⁶

Centers for Medicare and Medicaid Services Vaccination Rule

Medicare

The federal Medicare program provides health coverage for people age 65 or older and younger people with a disability.⁷⁷ To receive federal payment for Medicare-covered health care services, health care providers enter into an agreement with and are certified by the federal Centers for Medicare and Medicaid Services (CMS), an agency within the US Department of Health and Human Services (HHS).⁷⁸ CMS has broad statutory authority to regulate Medicare-covered services and providers.⁷⁹

State health care regulators inspect providers to assess compliance with federal Medicare requirements.⁸⁰ In Florida, the Agency for Health Care Administration (AHCA) performs that function under a contract with HHS.⁸¹ Failure to comply with certification requirements can result in CMS enforcement actions, including monetary penalties, payment suspension, and exclusion from the Medicare and Medicaid programs.⁸²

Nationally, 62.2 million people have Medicare coverage.⁸³ Florida has the second highest Medicare population in the country: one-fifth of Florida's population, or 4.7 million Floridians, are enrolled.

Medicaid

The Medicaid program is a federal and state health care program for low-income and disabled people. Generally, CMS sets the basic parameters for the program and the states administer it. AHCA administers the Medicaid program in Florida. Both the federal and state governments fund the Medicaid program. State contributions are set by the federal government as a condition of receiving federal matching funds.⁸⁴

To receive Medicaid reimbursement, health care providers must enroll and enter into a state Medicaid provider agreement, by which the state Medicaid agency ensures compliance with both state and federal requirements.⁸⁵ Failure to comply with these agreements and federal and state law can result in

⁷⁵ See, *Missouri, et al., v. Biden, et al.*, No. 21-01300 (E.D. Mo. filed on October 29, 2021) (Alaska, Arkansas, Iowa, Missouri, Montana, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming.); *Louisiana, et al., v. Biden, et al.*, No. 21-03867 (W.D. La. filed on November 4, 2021).

⁷⁶ Arizona Capitol Times, *Judge refuses to quash vaccine mandate*, <https://azcapitoltimes.com/news/2021/11/10/judge-refuses-to-quash-vaccine-mandate/> (last visited November 23, 2021.)

⁷⁷ See, generally, Title 42 U.S.C. 1395.

⁷⁸ Title 42 U.S.C. § 1395cc; 42 C.F.R. § 488.1.

⁷⁹ Title 42 U.S.C. § 1302(a) provides general regulatory authority; various US Code provisions specific to each provider type provide additional regulatory authority. For example, §§1102, 1832(a)(2)(f)(i), 1833(i)(1)(A) and 1871 of the Social Security Act grant specific authority related to ambulatory surgical centers.

⁸⁰ Title 42 U.S.C. § 1395aa requires the Secretary of the HHS to contract with willing states to perform this function, and authorizes federal payment for such activities.

⁸¹ US Department of Health and Human Services, Health Care Financing Administration, *Agreement between the Secretary of Health and Human Services and The State of Florida To Carry of the Provisions of Sections 1864, 1874 and Related Provisions of the Social Security Act*, April 8, 1985 (updating prior agreements dated 1966 and 1975), on file with the Health and Human Services Committee. In FY 18-19, AHCA received \$14,057,378 from HHS for this service, which is about 13% of AHCA's regulatory budget. Correspondence from AHCA to the House Health and Human Services Committee, Nov. 9, 2021, on file with the committee.

⁸² 42 U.S.C. § 1320a-7 (exclusion from the program); 42 U.S.C. 1320a-7a (civil monetary penalties).

⁸³ Kaiser Family Foundation, *State Health Facts, Total Number of Medicare Beneficiaries 2020*, available at [Total Number of Medicare Beneficiaries | KFF](#) (last viewed Nov. 9, 2021).

⁸⁴ Title 42 U.S.C. §§ 1396-1396w-5; Title 42 C.F.R. Part 430-456 (§§ 430.0-456.725) (2016).

⁸⁵ 42 U.S.C. § 1396a(27); § 409.907, et seq., F.S.

termination by the state Medicaid agency. CMS can choose to terminate that provider's Medicaid agreements in all other states (if any), and can remove a terminated Medicaid provider from the Medicare program, nationally.⁸⁶

Florida's program is fourth largest in the US by enrollment, and fifth largest in expenditures.⁸⁷ Over 4.9 million Floridians are currently enrolled, including half the children in the state. More than half (56 percent) of the childbirths in Florida are covered by Medicaid, and Medicaid pays for 63 percent of nursing home bed days.⁸⁸ Medicaid is the largest single program in the state, representing 33.9 percent of the total Fiscal Year 2021-2022 budget (all funds). Medicaid expenditures represent over 22.6 percent of the total *state* funds for Fiscal Year 2021-2022.

CMS Vaccination Rule

On November 5, 2021, CMS issued a new regulation (CMS Rule)⁸⁹ governing Medicare certification and Medicaid provider enrollment. As a condition of receiving Medicare and Medicaid funds, health care providers must establish and implement policies that will ensure that all workers are fully vaccinated⁹⁰ against COVID-19.⁹¹

Applicability

The CMS Rule applies to certain providers, not to every provider that receives Medicare/Medicaid reimbursement.⁹² CMS estimates the rule will apply to 76,054 health care providers nationwide.⁹³ In Florida, most health care providers are Medicare-certified and treat Medicare patients. Assuming all the licensees of the types covered by the rule are Medicare-certified, 4,353 Florida health care businesses will be subject to the rule.⁹⁴

Each provider must adopt and implement policies ensuring workers are vaccinated with the first dose by December 5 (30 days after the rule effective date), and the second dose (as applicable) by January

⁸⁶ See, e.g., 42 U.S.C. § 1320a-7(b)(5), authorizing Medicare termination based on state Medicaid termination.

⁸⁷ Kaiser Family Foundation, *State Health Facts, Total Monthly Medicaid/CHIP Enrollment and Pre-ACA Enrollment*, May 2021, available at [Total Monthly Medicaid/CHIP Enrollment and Pre-ACA Enrollment | KFF](#) (last viewed Nov. 8, 2021); Kaiser Family Foundation, *State Health Facts, Total Medicaid Spending, 2020*, available at [Total Medicaid Spending | KFF](#) (last viewed Nov. 8, 2021).

⁸⁸ Agency for Health Care Administration, Presentation to the House Finance & Facilities Subcommittee, *MEDICAID QUALITY UPDATES*, slide 7, Nov. 3, 2021, available at <https://www.myfloridahouse.gov/Sections/Committees/committeesdetail.aspx?CommitteeId=3090> (last viewed Nov. 9, 2021).

⁸⁹ The regulation was issued as an Interim Final Rule. Under Medicare law, Interim Final Rules expire three years after issuance, unless finalized. The Interim Final Rule was effective on the day of publication in the Federal Register (Nov. 5, 2021). See, Social Security Act § 1871(a)(3) (42 U.S.C. § 1395hh(a)(3)).

⁹⁰ "Fully vaccinated" means a person 14 days after receipt of either a single-dose vaccine or the second of a two-dose vaccinations sequence. 61563, citing Centers for Disease Control and Prevention, *When You've Been Fully Vaccinated*, Oct. 15, 2021, available at [When You've Been Fully Vaccinated | CDC](#) (last viewed Nov. 8, 2021).

⁹¹ Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61555 to 61627 (Nov. 5, 2021) (to be codified at 42 C.F.R. pts. 416, 418, 441, 460, 482-486, 491, and 494), available at [2021-23831.pdf \(govinfo.gov\)](#) (last viewed Nov. 8, 2021).

⁹² Health Care Staff Vaccination, 86 Fed. Reg. 61569-61570. The following providers must comply with the rule: Ambulatory Surgical Centers, Hospices, Psychiatric residential treatment facilities, Programs of All-Inclusive Care for the Elderly, Hospitals, Nursing Homes, Intermediate Care Facilities for Individuals with Intellectual Disabilities, Home Health Agencies, Comprehensive Outpatient Rehabilitation Facilities, Critical Access Hospitals, Clinics, rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services, Community Mental Health Centers, Home Infusion Therapy suppliers, Rural Health Clinics/Federally Qualified Health Centers, and End-Stage Renal Disease Facilities.

⁹³ Health Care Staff Vaccination, 86 Fed. Reg. 61603, Table 5.

⁹⁴ Correspondence from AHCA to the House Health and Human Services Committee, Nov. 9, 2021, on file with the committee.

4 (60 days after the rule effective date). The vaccination policies must apply to employees, licensed practitioners,⁹⁵ students and trainees, volunteers, and contractors.⁹⁶

The requirement does *not* apply to staff working remotely 100 percent of the time, or to staff providing offsite support services if they have no direct contact with patients or other staff who are subject to the requirement. Similarly, it does not apply to one-time or infrequent non-health service providers or contractors who have no contact with patients or staff who are subject to the requirement.⁹⁷ The rule does not require vaccination for visitors or patients.

CMS estimates the rule will apply to 13,050,000 health care staff in the first year, nationwide.⁹⁸

Exemptions

The CMS Rule requires health care providers to create a process for granting the following exemptions⁹⁹:

- Temporary delay, as recommended by the CDC
- Medical exemptions, based on recognized clinical contraindications
- Exemptions based on existing federal law (disability or religious beliefs, observances and practices)

Exemptions for Temporary Delay

In the rule commentary, CMS acknowledges that there are staff for whom vaccination must be temporarily delayed for medical reasons. The rule appears to limit authorized delays to those justified by specific clinical precautions and considerations recommended by the CDC follows:¹⁰⁰

- History of heparin-induced thrombocytopenia (HIT) (90-day delay after illness, or mRNA vaccine only)
- Persons who received monoclonal antibodies or convalescent plasma for COVID-19 treatment (90-day delay)
- Persons with a known SARS-CoV-2 exposure (delay until quarantine period or symptoms end)
- Persons with a history of myocarditis or pericarditis (defer a subsequent dose if incidence occurred with first dose)

Requests for exemption due to temporary delay must be documented.¹⁰¹

Medical Exemptions

Medical exemption requests must confirm “recognized clinical contraindications to COVID-19 vaccines” recommended by the CDC, which appears to strictly limit the grounds for medical exemptions. Currently, the only CDC-recognized contraindication is severe allergic reaction (anaphylaxis) or

⁹⁵ This would include both employees and other practitioners authorized to serve patients in the provider facility, such as credentialed physicians treating patients in a hospital.

⁹⁶ Health Care Staff Vaccination, 86 Fed. Reg. 61570-61571 (see, e.g., amendment to 42 C.F.R. § 416.51 at 61616). Contractors are individuals who provide care, treatment, or other services for the provider and/or its patients, under contract or by other arrangement.

⁹⁷ CMS cites the example of an elevator repair contractor working in an isolated service area and sharing no common spaces or facilities (such as the cafeteria or restrooms) with patients or staff; *Id.* at 61571.

⁹⁸ Health Care Staff Vaccination, 86 Fed. Reg. 61603, Table 6.

⁹⁹ *Id.* at 61572 (see, e.g., amendment to 42 C.F.R. §416.51 at 61616)

¹⁰⁰ Centers for Disease Control and Prevention, *Summary Document for Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Authorized in the United States*, Oct. 30, 2021, available at [Summary Document for Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Authorized or Approved in the United States - FactSheet \(cdc.gov\)](#) (last viewed Nov. 8, 2021).

¹⁰¹ *See, e.g.*, Health Care Staff Vaccination, 86 Fed. Reg. 61616. The CDC will update this list as further data becomes available. It is unclear whether the practitioner documentation requirements for other types of medical exemptions also apply to exemptions based on temporary delay for clinical precautions and considerations.

immediate allergic reaction (within 4 hours) upon receiving a previous COVID-19 vaccine dose, or a known allergy to a component of the vaccine.¹⁰²

A medical exemption request must be documented to specify which COVID-19 vaccine is clinically contraindicated and the reasons for the contraindication. The documentation must be signed by a licensed practitioner who is not the individual requesting the exemption, and must include the practitioner's recommendation that the staff member be exempt from vaccination. The rule does not specify which practitioners may document exemption requests, but allows any practitioner properly operating within their state-defined scope of practice to do so.¹⁰³

Exemptions Based on Federal Law

Health care providers must also grant exemptions from the vaccination requirement based on applicable federal law.¹⁰⁴ The rule expressly refers employers to the federal Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act and the Genetic Information Nondiscrimination Act of 2008¹⁰⁵, and to guidance from the Equal Opportunity Employment Commission on how to apply those policies.¹⁰⁶ Exemptions based on federal law must be documented and evaluated in accordance with that law and with each provider's policies and procedures.¹⁰⁷

The CMS Rule requires providers to meet their obligations under existing law to protect the health and safety of their patients from unvaccinated (or not yet fully vaccinated) staff. Specifically, providers must prevent the spread of COVID-19 from unvaccinated staff by following "nationally recognized infection prevention and control guidelines intended to mitigate the transmission and spread of COVID-19", including additional precautions for all staff who are not fully vaccinated. Providers must create a policy and process for mitigating COVID-19 transmission by unvaccinated staff.¹⁰⁸

Enforcement

Each provider must track and securely document staff vaccination status, including granted exemptions and delays, and any booster doses.¹⁰⁹

Because state survey agencies conduct provider surveys to ensure compliance with CMS regulations, the CMS Rule commentary indicates that CMS will be issuing guidance to state survey agencies on how to survey for compliance with the vaccination rule. The guidance will include instructions on how to cite noncompliant providers for deficiencies. Penalties for noncompliant providers are based on existing law and regulations, including civil monetary fines, denial of payment for new admissions, and termination of the Medicare/Medicaid contract. Termination would eliminate payment for treating Medicare or Medicaid patients.¹¹⁰

¹⁰² See, e.g., Health Care Staff Vaccination, 86 Fed. Reg. 61616.

¹⁰³ *Id.*

¹⁰⁴ Health Care Staff Vaccination, 86 Fed. Reg. 61617 (see, e.g., amendment to 42 C.F.R. § 416.51 at 61616).

¹⁰⁵ This group of federal laws contain various protections from discrimination on the basis of disability, medical condition, sex, race, age, pregnancy, and religion. Employers are required to provide reasonable accommodation when requested, and are authorized to make sufficient inquiry about the nature and justification of the request to make a determination, within parameters that protect the worker from discrimination.

¹⁰⁶ See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, Sec. K, US Equal Opportunity Commission, updated Oct. 28, 2021, available at [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | US Equal Employment Opportunity Commission \(eeoc.gov\)](https://www.eeoc.gov/what-you-should-know-about-covid-19-and-the-ada-the-rehabilitation-act-and-other-eEO-laws) (last viewed Nov. 8, 2010).

¹⁰⁷ Health Care Staff Vaccination, 86 Fed. Reg. 61572.

¹⁰⁸ *Id.* at 61616.

¹⁰⁹ See, e.g., Health Care Staff Vaccination, 86 Fed. Reg. 61616.

¹¹⁰ *Id.* at 61574.

In Florida, 48 percent of hospital patients are Medicare patients and 14 percent are Medicaid patients. Over 26 percent of hospital revenue is from Medicare, and 5.4 percent from Medicaid.¹¹¹ In Florida nursing homes, 22 percent of residents are Medicare patients and 62 percent are Medicaid patients. About 30 percent of nursing home revenue is from Medicare, and 51 percent from Medicaid.¹¹²

CMS Rule Litigation

On November 10, 2021, ten states¹¹³ filed a lawsuit in federal court challenging the CMS rule. The states argue the rule violates the federal Administrative Procedure Act, is not authorized by Congress, and violates Medicare laws requiring consultation with state officials prior to issuing certain types of rules. The states also make constitutional claims related to spending powers, the anti-commandeering doctrine and the Tenth Amendment, and requested declaratory and injunctive relief.¹¹⁴ The court granted the plaintiffs' request for expedited briefing, but a hearing date on the preliminary injunction has not yet been set.

On November 18, 2021, the State of Florida filed a lawsuit in the Northern District of Florida challenging the CMS Rule.¹¹⁵ The state argues the CMS action:

- Exceeds its authority under federal law;
- Was issued without consulting the states as required under law;¹¹⁶
- Was issued without the notice and comment period required by law;
- Is arbitrary and capricious; and
- Is a condition of receiving federal funds which violates the Spending Clause of the U.S. Constitution.¹¹⁷

Florida requested the court issue a temporary restraining order and preliminary and permanent injunctive relief prohibiting defendants from enforcing the mandate,¹¹⁸ issue declaratory relief declaring the defendants' actions unlawful; and award costs, fees, and other relief the court deems equitable. On November 20, 2022, the U.S. District Court issued an order denying the motion by the Attorney General for a preliminary injunction or temporary restraining order because Florida had not shown "irreparable harm" to justify such an order.¹¹⁹

Federal Rule Making and Conflicts with State Laws

In the commentary on the CMS Rule, CMS expressly finds that any state law that prohibits employers from requiring employees to be vaccinated for COVID-19, or broadens the exemptions to such requirements beyond those authorized by the CMS Rule, directly conflicts with the CMS rule and is

¹¹¹ Agency for Health Care Administration, *Florida Hospital Uniform Reporting System, Payor Mix 2020*, available at https://ahca.myflorida.com/MCHQ/Central_Services/Financial_Ana_Unit/fa_data/index.shtml (last viewed Nov. 9, 2021). Note that the Medicaid revenue number excludes supplemental payments, which totaled \$1.7 billion for Florida hospitals in FY 20-21. In FY 21-22, new supplemental payment programs will bring that revenue to \$4 billion for Florida hospitals, in addition to service-based reimbursement.

¹¹² Florida Health Care Association, Presentation on Nursing Homes Financial Outlook, 5, July 2021, on file with the Health and Human Services Committee.

¹¹³ Missouri, Nebraska, Arkansas, Kansas, Iowa, Wyoming, Alaska, South Dakota, North Dakota, New Hampshire.

¹¹⁴ *Missouri, et al. v. Joseph Biden, Jr., et al.*, No. 21-01329, (E.D. Missouri filed on Nov. 10, 2021).

¹¹⁵ *Florida v. Dep't. of Health and Human Svcs., et al.*, No. 21-2722 (N.D. Fla. filed on November 17, 2021).

¹¹⁶ 42 U.S.C. s. 1395z

¹¹⁷ U.S. Const. art. I, s. 8

¹¹⁸ On November 17, 2021, Florida filed a Motion for a Temporary Restraining Order or Preliminary Injunction in the same court where the complaint was filed. In the motion, the state details why it is entitled to such an order or injunction and attempting to establish that it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of an order or injunction, and that the balance of equities tips in its favor and the order is in the public interest. A motion hearing has not yet been set.

¹¹⁹ The Orlando Sentinel, Jim Saunders, *Judge in Florida lawsuit won't delay COVID-19 vaccine mandate for health care workers*, <https://www.orlandosentinel.com/politics/os-ne-judge-denies-blocking-vaccine-mandate-20211122-rxpdsckax5ghfn3vjsc5acpoca-story.html> (last visited on November 23, 2021).

preempted. CMS concludes that the rule takes the “minimum action necessary to achieve the objectives of the statute”, and explains the lack of consultation with state officials¹²⁰ is due to the emergency nature of the COVID-19 Delta variant.¹²¹ CMS does, however, invite state officials to submit comments on the rule, which will be due January 4, 2022.¹²²

In issuing the OSHA ETS, OSHA included the required analysis of its impact on federalism.¹²³ OSHA notes the statutory authority for OSHA standards to preempt state occupational safety and health standards in states without OSHA-approved State Plans. However, OSHA then expressly states that its intent is to preempt conflicting state and federal laws.¹²⁴ OSHA also concludes that, for states operating under OSHA-approved State Plans, the OSHA ETS “does not significantly limit State policy options,” which justifies its lack of consultation with state officials.

Health Insurance Portability and Accountability Act, COVID-19 Vaccinations, and the Workplace

HHS recently announced workplace guidance on the Health Insurance Portability and Accountability Act’s (HIPAA) applicability to disclosures and requests for information about whether a person has received a COVID-19 vaccination. According to the HHS Office for Civil Rights, the HIPAA Privacy Rule applies only to covered entities, including health plans, health care clearinghouses, health care providers that conduct standard electronic transactions, and certain business associates. It does not apply to employers or employment records.¹²⁵

The HIPAA Privacy Rule does not prohibit a covered entity or business associate, acting as an employer, from requiring or requesting each workforce member to provide documentation of his or her COVID-19 or flu vaccination to such member’s current or prospective employer. Consequently, nothing in HIPAA’s Privacy Rule prohibits employers from requiring an employee to disclose whether he or she has been vaccinated and provide documentation of this requirement. Documentation of vaccination and other records must be kept confidential under Title I of the ADA.¹²⁶

Equal Employment Opportunity Commission (EEOC)

On May 28, 2021, EEOC released technical assistance¹²⁷ related to the COVID-19 pandemic that said employers could legally require COVID-19 vaccinations to re-enter a physical workplace as long as they follow requirements to find alternative arrangements for employees unable to be vaccinated for medical reasons or because they have religious objections.¹²⁸

The technical assistance answers COVID-19 questions only from the perspective of the federal EEO laws. It does not cover other federal, state, and local laws that may be related to the COVID-19 pandemic for employers and employees. The technical assistance provided the following information for employers concerning vaccinations in an employment context:

¹²⁰ Exec. Order No. 13,132, 64 Fed. Reg. 43255 (Aug. 10, 1999).

¹²¹ *Id.*

¹²² *Id.* at 61555.

¹²³ 86 Fed. Reg. 61402, COVID-19 Vaccination and Testing; Emergency Temporary Standard.

¹²⁴ *Id.*; See 86 Fed. Reg. 61406, 61437, 61439, 61445.

¹²⁵ US Department of Health and Human Services, *Health Information Privacy*, <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-vaccination-workplace/index.html> (last visited Oct. 29, 2021).

¹²⁶ Title I of the ADA prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including State and local governments. It also applies to employment agencies and to labor organizations.

¹²⁷ US Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= (last visited Nov. 1, 2021).

¹²⁸ US Equal Employment Opportunity Commission, *EEOC ISSUES UPDATED COVID-19 TECHNICAL ASSISTANCE* (May 28, 2021), <https://content.govdelivery.com/accounts/USEEOC/bulletins/2e1bfc4> (last visited Nov. 8, 2021).

- Federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as employers comply with the reasonable accommodation provisions of the ADA and Title VII of the Civil Rights Act of 1964 and other EEO considerations. Other laws, not in EEOC’s jurisdiction, may place additional restrictions on employers. From an EEO perspective, employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.
- Federal EEO laws do not prevent or limit employers from offering incentives to employees to voluntarily provide documentation or other confirmation of vaccination obtained from a third party (not the employer) in the community, such as a pharmacy, personal health care provider, or public clinic. If employers choose to obtain vaccination information from their employees, employers must keep vaccination information confidential pursuant to the ADA.
- Employers that are administering vaccines to their employees may offer incentives for employees to be vaccinated, as long as the incentives are not coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information.
- Employers may provide employees and their family members with information to educate them about COVID-19 vaccines and raise awareness about the benefits of vaccination. The technical assistance highlights federal government resources available to those seeking more information about how to get vaccinated.¹²⁹

Reemployment Assistance

The Federal-State Unemployment Insurance Program provides unemployment benefits to eligible workers who are unemployed through no fault of their own, as determined by state law, and meet the requirements of state law. The program is administered as a partnership between the federal government and the states.

In general, states are permitted to set eligibility conditions for benefit recipients, the amount and duration of benefits, and the state tax structure, so long as state provisions are not in conflict with the Federal Unemployment Tax Act or the Social Security Act.¹³⁰

Florida’s RA program, administered by DEO and codified in ch. 443, F.S., requires claimants to meet certain criteria for eligibility and contains grounds for claimant disqualification. To be eligible to receive benefits for any week, an unemployed individual¹³¹ must:

- Make a claim for that week
- Complete DEO’s online work registration, then report to the one-stop career center as directed¹³²
- Report the name and address of each respective employer contacted
- Be able and available to work¹³³
- Participate in reemployment services
- Be unemployed for a waiting period of one week

¹²⁹ *Id.*

¹³⁰ Title III, Title IX, and Title XII of the Social Security Act.

¹³¹ Specified individuals who provide services to educational institutions are not eligible to receive benefits for the customary periods between two academic terms, periods of sabbatical, vacation, or holiday recess. S. 443.091(3), F.S.

¹³² This requirement does not apply to persons specified in s. 443.091(1)(b), F.S., such as non-Florida residents and individuals on a temporary layoff.

¹³³ To be “available” for work, a claimant must be actively seeking work. S. 443.091(1)(d).

- Have received wages for insured work equal to 1.5 times his or her high quarter wages during his or her base period¹³⁴
- Submit to DEO a valid social security number assigned to him or her¹³⁵

Chapter 443, F.S., defines “misconduct” in the workplace or during working hours as conduct that: demonstrates conscious disregard of an employer’s interests;¹³⁶ is careless or negligent to a degree or recurrence that indicates culpable or wrongful intent;¹³⁷ results in chronic absenteeism or tardiness in deliberate violation of a known policy of the employer;¹³⁸ constitutes a willful and deliberate violation of a standard or regulation of the state by an employee of an employer licensed or certified by the state;¹³⁹ or a violation of an employer’s rule.¹⁴⁰ An unemployed individual does not engage in misconduct if they violate an employer’s rule and can demonstrate that:

- He or she did not know, and could not have reasonably known of the rule;
- The rule is not lawful or reasonably related to the job; or
- The rule is not fairly or consistently enforced.¹⁴¹

Among other reasons for disqualification found in Florida’s RA laws, an unemployed individual is disqualified from receiving benefits if DEO finds that the individual:

- Voluntarily left work without good cause attributable to his or her employer;
- Has been discharged by his or her employer for misconduct;
- Is unemployed due to a suspension for misconduct connected to his or her work;
- Is unemployed due to a leave of absence initiated by the individual; or
- Is discharged for misconduct connected with the individual’s work, consisting of drug use, confirmed by a positive drug test¹⁴²

An unemployed individual will also be disqualified from receiving benefits if DEO finds that the individual has failed without good cause to apply for available suitable work, accept suitable work when offered to him or her, or return to his or her customary self-employment when directed by DEO.¹⁴³

When determining if work is suitable for an individual, DEO considers the degree of risk to the individual’s health, safety, and morals; the individual’s physical fitness, prior training, experience, prior earning, length of unemployment, and prospects for securing local work in his or her customary occupation; and the distance of the available work from this individual’s residence.¹⁴⁴

Schools, Students, and Parents Response to COVID-19

¹³⁴ A base period is the first four quarters of the previous five completed quarters prior to the employee filing a claim, during which an employee must have worked and earned wages. The total base period earnings must meet a minimum of \$3,400 and be at least 1.5 times the wages in the quarter having the highest earnings. Florida Department of Economic Opportunity, *Florida Reemployment Assistance Quarter Change Fact Sheet*, <https://floridajobs.org/docs/default-source/reemployment-assistance-center/cares-act/quarter-change-fact-sheet.pdf?#:~:text=The%20base%20period%20is%2012,is%20divided%20into%20four%20quarters> (last visited Nov. 11, 2021).

¹³⁵ S. 443.091(1), F.S.

¹³⁶ This conduct must also be found to be a deliberate violation of the reasonable standards of behavior the employer expects of his or her employee. S. 443.036(29)(a), F.S.

¹³⁷ This carelessness or negligence may also show an intentional and substantial disregard for the employer’s interests or the employee’s duties to the employer. S. 443.036(29)(b), F.S.

¹³⁸ This conduct includes one or more unapproved absences following a written warning relating to prior absences. S. 443.036(29)(c), F.S.

¹³⁹ Such violation must be able to cause the employer to be sanctioned or have its license or certification suspended by the state. S. 443.036(29)(d), F.S.

¹⁴⁰ S. 443.036(29), F.S.

¹⁴¹ S. 443.036(29)(e), F.S.

¹⁴² S. 443.101(1), F.S.

¹⁴³ S. 443.101(2), F.S.

¹⁴⁴ S. 443.101(2)(a), F.S.

Article IX, section 4(b) of the Florida Constitution requires the school board to operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed by the constitution. Florida statutes authorize each district school board to exercise any power not expressly prohibited by the state constitution or law,¹⁴⁵ require each board to perform all duties assigned to it by law or State Board of Education rule,¹⁴⁶ and grant each board specific powers and duties.¹⁴⁷

Current law authorizes DOH to adopt rules to prevent and control communicable disease in schools.¹⁴⁸ Section 1003.22, F.S., in pertinent part, requires DOH, after consultation with the Department of Education (DOE), to adopt rules governing the immunization of children against, the testing for, and the control of preventable communicable diseases.¹⁴⁹ COVID-19 has been determined to be a communicable disease.¹⁵⁰

Schools in Florida were closed to in-person instruction on March 17, 2020, and remained closed for the remainder of the 2019-2020 academic year. The state ordered schools to reopen for in-person instruction by August 31, 2020.

All school districts submitted a plan for reopening schools for in-person instruction during the 2020-2021 school year.¹⁵¹ As part of the reopening plan, many school districts implemented mandatory masking policies and several sought to continue those policies during the 2021-2022 school year.¹⁵²

In April 2021, given Florida's continued strong recovery from the COVID-19 pandemic, the Education Commissioner requested that, as part of their preparation for the 2021-2022 school year, all Florida school districts and schools implement voluntary masking policies.¹⁵³

Over the summer of 2021, given the rise of the COVID-19 delta variant, there were discussions in several school districts to implement mask mandates for the 2021-2022 school year.¹⁵⁴

On July 30, 2021, the Governor issued Executive Order 21-175, Ensuring Parents' Freedom to Choose – Masks in Schools, in which he directed DOE and DOH to undertake emergency rulemaking to ensure Florida's school districts and schools implement policies consistent with the Parents' Bill of Rights¹⁵⁵

¹⁴⁵ S. 1001.32(2), F.S.

¹⁴⁶ S. 1001.41(5), F.S.

¹⁴⁷ S. 1001.42, F.S.

¹⁴⁸ S. 1003.22(3), F.S.

¹⁴⁹ *Id.*

¹⁵⁰ Florida Department of Health, Division of Disease Control, *Emergency Rule 64DER20-34*, November 12, 2020, <http://www.floridahealth.gov/diseases-and-conditions/disease-reporting-and-management/documents/emergency-rule-reporting-results.pdf>

¹⁵¹ See Florida Department of Education, *Approved K-12 District Re-Opening Plans*, <http://www.fldoe.org/em-response/> (last visited November 9, 2021).

¹⁵² Florida Department of Education, *Memorandum: Planning for the 2021-2022 School Year*, (April 14, 2021), available at <https://www.fldoe.org/core/fileparse.php/19861/urlt/OptFacemaskPolicyMemo.pdf>.

¹⁵³ ABC Action News Tampa Bay, *Florida education commissioner asks school districts to make masks voluntary for next school year*, <https://www.abcactionnews.com/news/coronavirus/florida-education-commissioner-asks-for-schools-to-cancel-mask-mandates> (Last visited November 10, 2021).

¹⁵⁴ Bailey Gallion and Bobby Block, Florida Today, *Debate over mask requirements in schools resurfaces as Delta variant spreads in Florida*, July 22, 2021, <https://www.floridatoday.com/story/news/education/2021/07/22/mask-requirements-schools-florida-brevard-county-delta-variant-july-2021-school-year/8060843002/>. (last visited Nov. 10, 2021).

¹⁵⁵ Ch. 2021-199, Laws of Fla. The chapterlaw created Chapter 1014, F.S., enumerating parental rights with respect to a minor child for education health care, and criminal justice procedures. The state, its political subdivisions, any other governmental entities and any other institutions are prohibited from infringing upon the fundamental right of a parent to direct the upbringing, education health care, and mental health of his or her minor child without demonstrating a compelling state interest for such infringement.

passed by the Legislature in 2021.¹⁵⁶ This order also indicated that the state would withhold state funding from school districts that violated such rules.¹⁵⁷

On August 6, 2021, DOE and DOH issued emergency rules to protect the rights of Florida parents and require Florida's school districts and schools to include a parental opt-out to any masking requirements implemented for the 2021-2022 school year.¹⁵⁸ However, Alachua, Brevard, Broward, Duval, Hillsborough, Indian River, Leon, Miami-Dade, Orange, Palm Beach, and Sarasota school districts disregarded the emergency rules and implemented mask mandates without a parental opt-out.¹⁵⁹

DOH issued an updated emergency rule on September 22, 2021. The revised rule relaxes the requirements for quarantining students exposed to COVID-19 but who are asymptomatic. The rule also strengthened the parental opt-out provision by providing that the opt-out is at the parent's "sole discretion."¹⁶⁰ According to DOH, it was observed that a large number of students were required to quarantine for long periods of time, resulting in the loss of hundreds of thousands of days of in-person learning. In addition, DOH observed no meaningful difference in the number of COVID-19 cases in school-aged children in counties where school districts have imposed mask mandates. DOH found it necessary to "minimize the amount of time students are removed from in-person learning based solely on direct contact with an individual that is positive for COVID-19, to ensure parents and legal guardians are allowed the flexibility to control the education and health care decisions of their own children, and to protect the fundamental rights of parents guaranteed under Florida law."¹⁶¹

Pursuant to its oversight authority in s. 1008.32, F.S., DOE sanctioned school districts that failed to comply with the requirements of the DOE emergency rules.¹⁶² Affected parents filed a petition for writ of mandamus with the First DCA seeking enforcement of the DOH rule.¹⁶³ The First DCA stated that the school districts must follow the DOH rule until it is successfully challenged.¹⁶⁴

Lawsuit on Behalf of Florida Disabled Students under Federal law

On August 6, 2021, a group of disabled students and their parents filed a lawsuit in federal court against Governor DeSantis, DOE, the Commissioner of Education, and the school boards of Orange, Miami-Dade, Hillsborough, Palm Beach, Broward, Pasco, Alachua, and Volusia counties, alleging discrimination in violation of the federal ADA and Rehabilitation Act.¹⁶⁵

The plaintiff parents allege that their children are all at higher risk for severe illness or death due to COVID-19 and will not go to public school because of this risk.

¹⁵⁶ Fla. Exec. Order 21-175 (July 30, 2021).

¹⁵⁷ *Id.*

¹⁵⁸ Executive Office of the Governor, *Florida Department of Health and Florida Department of Education Publish Rules to Protect Parents' Rights*, Aug. 6, 2021, <https://www.flgov.com/2021/08/06/florida-department-of-health-and-florida-department-of-education-publish-rules-to-protect-parents-rights/> (last visited Nov. 4, 2021).

¹⁵⁹ Florida Politics, *Which Florida School Boards are loosening their mask mandates?*, October 26, 2021, <https://floridapolitics.com/archives/443893-florida-jurisdictions-mask-mandates/> (last visited Nov. 4, 2021). School districts that maintained mask policies out of compliance with the emergency rules include: Alachua, Brevard, Broward, Duval, Hillsborough, Indian River, Leon, Miami-Dade, Orange, Palm Beach, and Sarasota.

¹⁶⁰ Rule 64DER21-15, Florida Administrative Register, Vol. 47, No. 185 (September 23, 2021).

¹⁶¹ *Id.*

¹⁶² See Florida Department of Education, *August 17, 2021 – Emergency Meeting Agenda*, <https://www.fldoe.org/policy/state-board-of-edu/meetings/2021/2021-08-17/> (last visited Nov. 4, 2021) and Florida Department of Education, *October 7, 2021 – Meeting Agenda*, <https://www.fldoe.org/policy/state-board-of-edu/meetings/2021/2021-10-07/> (last visited Nov. 4, 2021). DOE issued final administrative orders against the following counties: Alachua, Brevard, Broward, Duval, Leon, Miami-Dade, Orange, and Palm Beach.

¹⁶³ *Dortch, et al., v. Alachua Cnty. Sch. Bd., et al.*, Order Transferring Case to Circuit Court, Case No. 1D21-2994, (Fla. 1st DCA Oct. 29, 2021), available at https://www.1dca.org/content/download/799061/opinion/212994_DC04_10292021_170027_i.pdf (transferring the case to circuit court for an "immediate hearing and a prompt decision on the merits").

¹⁶⁴ *Id.* at 5-6.

¹⁶⁵ 28 C.F.R. § 35.130(b)(3).

Plaintiffs allege that the defendants have violated the following ADA regulations and provisions:

- Failing to make a reasonable modification under circumstances where it is required;¹⁶⁶
- Excluding plaintiffs from the participation in public education;¹⁶⁷
- Failing to make its services, programs, and activities “readily accessible” to disabled individuals;¹⁶⁸
- Administering a policy that subjects qualified individuals with disabilities to discrimination on the basis of disability and defeats or substantially impairs accomplishment of the objectives of a public entity's program with respect to individuals with disabilities;¹⁶⁹ and
- Failing to permit a public entity to administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.¹⁷⁰

The federal district court denied the plaintiffs’ motion for a preliminary injunction on September 30, and the plaintiffs appealed to the 11th Circuit Court of Appeal. Briefing must be completed by December 27, and, by order of the court, the case will be placed on the next available oral argument calendar.

Administrative Challenges to the August 6 Rule

Several school districts and other interested parties challenged the rule under ch. 120, F.S., in early September 2021, alleging DOH did not have sufficient statutory authority to adopt it.¹⁷¹ Petitioners included the school boards of Alachua, Broward, Leon, Miami-Dade, and Orange counties; the Florida State Conference of NAACP; the Florida Student Power Network; Rocky Hanna, as Superintendent of Leon County Schools; and several students and parents.

The individual cases were consolidated into one proceeding, for administrative ease, and set for final hearing on September 24, 2021. On September 14, 2021, DOH moved to dismiss the school board petitioners for lack of standing and lack of jurisdiction¹⁷², but the administrative law judge (ALJ) denied the motion on September 20, 2021. That same day, DOH filed a petition for writ of prohibition in the First DCA, seeking to prevent the Division of Administrative Hearings (DOAH) from exercising jurisdiction over the rule challenges. On September 22, 2021—two days before the final hearing—DOH moved to dismiss the rule challenges for mootness, because it had just enacted the September 22 Rule, which repealed and replaced the August 6 Rule. That same day, the ALJ granted DOH’s motion and dismissed the consolidated rule challenges as moot. All pending cases related to the August 6 DOH Rule were then closed.¹⁷³

Administrative Challenge to the September 22 Rule

On October 6, 2021, the school boards of Miami-Dade, Leon, Duval, Orange, Broward, and Alachua counties and Rocky Hanna, Superintendent of Leon County Schools, filed an administrative challenge

¹⁶⁶ 28 C.F.R. § 35.130(b)(7); 34 C.F.R. § 104.34(a).

¹⁶⁷ 42 U.S.C. § 12132; 28 C.F.R. § 35.130; 34 C.F.R. § 104.34(a).

¹⁶⁸ 28 C.F.R. § 35.150; 34 C.F.R. § 104.34(a).

¹⁶⁹ 28 C.F.R. § 35.130(b)(3).

¹⁷⁰ 28 C.F.R. § 35.130(d); 34 C.F.R. § 104.34(a).

¹⁷¹ State of Florida, Division of Administrative Hearings, Case No: 21-0026996RE.

¹⁷² DOH relied on Florida’s public official standing doctrine. The doctrine prohibits members of the executive branch from challenging the constitutionality of legislative action, unless the public official has suffered a personal injury. The doctrine was first clearly articulated by the Florida Supreme Court in *State ex rel. Atlantic Coast Line Railway Co. v. State Board of Equalizers*, 94 So. 681 (Fla.1922). The purpose was to protect the power of judicial review, which is the “check” the judiciary provides to maintain our constitutional separation of powers. Harris, R. Todd, *The Deep Roots of Florida’s Public Official Standing Doctrine and Its Vital Role in Preserving Our Constitutional Separation of Powers*, THE FLORIDA BAR JOURNAL, vol. 95, no. 2, March/April 2021, available at www.floridabar.org/the-florida-bar-journal/the-deep-roots-of-floridas-public-official-standing-doctrine-and-its-vital-role-in-preserving-our-constitutional-separation-of-powers/ (last visited Nov. 10, 2021).

¹⁷³ State of Florida, Division of Administrative Hearings, Case No: 21-0026996RE.

to the September 22 Rule.¹⁷⁴ The petitioners' claim that the September 22 Rule is an invalid exercise of delegated legislative authority. Specifically, they alleged that:

- DOH exceeded its grant of rulemaking authority;
- DOH failed to follow emergency rulemaking procedures;
- The opt-out provisions improperly enlarge or modify the provisions of s. 1003.22, F.S.;
- The parental opt-out requirements are vague and fail to establish adequate standards; and
- The parental opt-out requirements are arbitrary and capricious.

The final DOAH hearing was held on October 21, 2021. On November 5, 2021, the ALJ issued a final order in favor of DOH, finding that the school board did not prove the rule is an invalid exercise of legislative authority, and dismissed the case. The school boards¹⁷⁵ appealed the decision to the Fourth DCA.¹⁷⁶ Under an expedited schedule, briefing will be completed by November 30, and the court will make a determination by December 7.

Effect of Proposed Changes

Private Employer COVID-19 Vaccination Mandates (Expires June 1, 2023)

Prohibition and Exemptions

The bill defines "COVID-19" as the novel coronavirus identified as SARS-CoV-2; any disease caused by SARS-CoV-2, its viral fragments, or a virus mutating therefrom; and all conditions associated with the disease which are caused by SARS-CoV-2, its viral fragments, or a virus mutating therefrom.

The bill prohibits a private employer from imposing a COVID-19 vaccination mandate for any full-time, part-time, or contract employee without providing individual exemptions that allow an employee to opt out of such requirement on the basis of:

- Medical reasons, including, but not limited to, pregnancy or anticipated pregnancy;
- Religious reasons;
- COVID-19 immunity;
- Periodic testing; and
- Employer-provided personal protective equipment.

The bill also prohibits an employer from imposing a policy that prohibits an employee from choosing to receive a COVID-19 vaccination.

Exemption Statements

To obtain an exemption, an employee must submit an exemption statement to the employer. The bill requires employers to use forms adopted by DOH, or substantially similar forms, for employees to submit exemption statements.

To claim an exemption based on medical reasons, including, but not limited to, pregnancy or anticipated pregnancy, the bill requires employees to present to the employer an exemption statement, dated and signed by a physician or a physician assistant who holds a valid, active license¹⁷⁷ or an

¹⁷⁴ State of Florida, Division of Administrative Hearings, Case No: 21-003066RE.

¹⁷⁵ By order of the Fourth DCA, Leon County School Board and Rocky Hanna, as superintendent of Leon County Schools, withdrew from the appeal on November 12, and the School Board of Alachua County withdrew from the appeal on November 15.

¹⁷⁶ Petitioner's Notice of Appeal, filed November 5, 2021, available at

<https://www.doah.state.fl.us/DocDoc/2021/003066/21003066APEL-110521-02562566.pdf> (last visited Nov. 17, 2021). The Leon County School Board and Superintendent Rocky Hanna subsequently voluntarily dismissed its appeal. Appellant's Notice of Voluntary Dismissal and Motion, filed Nov. 9, 2021, available at <https://www.doah.state.fl.us/DocDoc/2021/003066/21003066M-110921-01503781.pdf> (last visited Nov. 17, 2021).

¹⁷⁷ These licenses must be under ch. 458, F.S., for medical practice or ch. 459, F.S., for osteopathic medicine.

advanced practice registered nurse who holds a valid, active license¹⁷⁸ who has examined the employee. The statement must provide that, in the professional opinion of the physician, physician assistant, or advanced practice registered nurse, COVID-19 vaccination is not in the employee's best medical interest.

The bill requires DOH to adopt rules specifying circumstances that are considered an anticipated pregnancy, including, but not limited to, a maximum timeframe within which one anticipates pregnancy for the purpose of claiming an exemption.

To claim an exemption based on religious reasons, the bill requires employees to present to the employer an exemption statement indicating that the employee declines COVID-19 vaccination because of a sincerely held religious belief.

To claim an exemption based on COVID-19 immunity, the bill requires employees to present to the employer an exemption statement demonstrating competent medical evidence that the employee has immunity to COVID-19, documented by the results of a valid laboratory test performed on the employee. The bill requires DOH to adopt a standard for demonstrating competent medical evidence of such immunity.

To claim an exemption based on periodic testing, the bill requires employees to present to the employer an exemption statement indicating that the employee agrees to comply with regular testing for the presence of COVID-19 at no cost to the employee.

To claim an exemption based on employer-provided personal protective equipment, the bill requires employees to present to the employer an exemption statement indicating that the employee agrees to comply with the employer's reasonable written requirement to use employer-provided personal protective equipment when in the presence of other employees or other persons.

The bill requires an employer who receives a completed exemption statement to allow the employee to opt out of the employer's COVID-19 vaccination mandate.

Employer Violations

The bill authorizes employees to file a complaint with DLA alleging that an exemption has not been offered or has been improperly applied or denied in violation of the exemption requirements. If DLA investigates and finds that the exemption was not offered or was improperly applied or denied, it must notify the employer of its determination and allow the employer the opportunity to cure the noncompliance.

The bill provides that an employer who fails to comply with the exemption requirements and terminates an employee based on a COVID-19 vaccination mandate commits a violation. Termination also includes the functional equivalent of termination.

Complaints and Investigations

The bill authorizes an employee to file a complaint with DLA alleging that an exemption has not been offered or has been improperly denied or applied. If DLA investigates such complaint and finds the complaint valid, DLA must notify the employer of its findings and allow the employer the opportunity to cure the problem.

The bill also allows terminated employees to file a complaint with DLA alleging that an exemption has not been offered or has been improperly applied or denied, resulting in the employee's termination. The

¹⁷⁸ Advance practice registered nurses are licensed under ch. 464, F.S.

bill requires DLA to conduct an investigation of a complaint filed by a terminated employee. The investigation, at a minimum, must determine whether the:

- Employer has imposed a COVID-19 vaccination mandate;
- Employee has submitted a proper exemption statement and complied with any specified condition; and
- Employee was terminated as a result of the COVID-19 vaccination mandate.

Fines

If the AG finds that an employee has been improperly terminated, the bill requires the AG to impose an administrative fine not to exceed:

- For an employer with fewer than 100 employees, \$10,000 per violation.
- For an employer with 100 or more employees, \$50,000 per violation.

The bill prohibits the AG from imposing a fine on an employer that reinstates, prior to the issuance of a final order, a terminated employee with back pay to the date that the complaint was received by DLA.

The bill authorizes the AG to consider any of the following factors when determining the amount of the fine to be levied:

- Whether the employer was knowingly and willfully in violation.
- Whether the employer has shown good faith in attempting to comply.
- Whether the employer has taken action to correct the violation.
- Whether the employer has previously been assessed a fine for a violation.
- Any other mitigating or aggravating factor that fairness or due process requires.

The decision of the AG constitutes agency action for purposes of the APA¹⁷⁹ and fines collected must be deposited in the General Revenue Fund.

Reemployment Assistance

The bill clarifies that employees of private businesses, educational institutions, and governmental entities terminated based on a COVID-19 vaccination mandate that is inconsistent with the bill, may be eligible to receive reemployment assistance in addition to any other remedy available to the employee.

Under the bill, if an employee is terminated for refusing to comply with a COVID-19 vaccination mandate that is inconsistent with the bill, the employee cannot be disqualified from receiving benefits on the grounds that such refusal is misconduct. The bill also provides that such an employee will not be disqualified from receiving benefits if he or she turns down a job offer by an employer who imposes a COVID-19 vaccination mandate that is inconsistent with the bill. Specifically, the bill states that such potential employment is not considered suitable work.¹⁸⁰

Prohibition on Public Employee COVID-19 Vaccination Mandates. (Expires June 1, 2023)

The bill provides the following definitions:

- "COVID-19" has the same meaning as s. 381.00317(1), F.S., which means the novel coronavirus identified as SARS-CoV-2; any disease caused by SARS-CoV-2, its viral fragments, or a virus mutating therefrom; and all conditions associated with the disease which are caused by SARS-CoV-2, its viral fragments, or a virus mutating therefrom.
- "Educational institution" means an institution under the control of a district school board; a charter school; a state university; a developmental research school; a Florida College System institution; the Florida School for the Deaf and the Blind; and the Florida Virtual School.

¹⁷⁹ Ch. 120, F.S.

¹⁸⁰ This is notwithstanding ch. 443, F.S., relating to reemployment assistance.

- "Governmental entity" means the state or any political subdivision thereof, including the executive, legislative, and judicial branches of government; the independent establishments of the state, counties, municipalities, districts, authorities, boards, or commissions; or any agencies that are subject to ch. 286, F.S.¹⁸¹

The bill prohibits, notwithstanding any other law to the contrary, an educational institution or a governmental entity from imposing a COVID-19 vaccination mandate for any full-time, part-time, or contract employee. Any existing ordinance, rule, or policy imposing such mandate is null and void as of the effective date of the bill.

An educational institution or a governmental entity that imposes a COVID-19 vaccination mandate for any full-time, part-time, or contract employee commits a violation of this prohibition for each employee subject to the employer's COVID-19 vaccination mandate. The bill authorizes DOH to impose a fine not to exceed \$5,000 per violation and fines collected must be deposited in the General Revenue Fund.

Educational Mandates in Response to COVID-19 (Expires June 1, 2023)

The bill prohibits educational institutions or any elected or appointed official from imposing a COVID-19 vaccination mandate for any student.

The bill maintains a parent's right to allow their child to wear a face mask, face shield or facial covering at school. No district school board, district school superintendent, or elected or appointed local official, or school board employee may require a student to wear a face mask, face shield, or other facial covering that fits over the mouth or nose, unless it is safety equipment required as part of a course of study consistent with occupational or laboratory safety requirements.

The bill prohibits a school board, school district superintendent, elected or appointed local official, or any district school board employee from barring an asymptomatic student, who has not received a positive COVID-19 test, from attending school or school-sponsored activities, being on school property or being subject to restrictions or disparate treatment, based on the student's exposure to COVID-19.

A parent, emancipated minor, or student who is 18 years of age or older may seek declaratory judgment and injunctive relief for any act or practice that violates the prohibition on vaccinations, face coverings or quarantine. A prevailing parent or student must be awarded attorney fees and court costs.

The bill prohibits a school board, school district superintendent, elected or appointed local official, or any district school board employee from barring an asymptomatic employee that has not received a positive COVID-19 test from returning to work or being subject to restrictions or disparate treatment, based upon the employee's exposure to COVID-19.

Emergency Rules

The bill authorizes DOH, DLA, and DEO to adopt emergency rules governing COVID-19 vaccination mandate exemptions and all conditions under the APA are deemed met. Such rulemaking must occur initially by filing emergency rules within 15 days after the effective date of the bill. An employer COVID-19 vaccination mandate is deemed invalid until DOH files its emergency rules or 15 days after the effective date of the bill, whichever occurs first.

DOH is required to adopt emergency rules to specify requirements for the frequency and methods of testing which may be used by employers, to establish standards for competent medical evidence that the employee has immunity to COVID-19, to specify circumstances that are considered an anticipated pregnancy, and to create forms to be used as follows:

¹⁸¹ This has the same meaning as in s. 768.38, F.S., governing liability protections for COVID-19-related claims.

- By a physician, a physician assistant, or an advanced practice registered nurse to document an exemption based on medical reasons, including, but not limited to, pregnancy or anticipated pregnancy.
- By an employee to document an exemption based on religious reasons.
- By an employee to document an exemption based on COVID-19 immunity. Such form must include the laboratory criteria for proof of immunity for the virus that causes COVID-19.
- By an employee to document an exemption based on periodic testing. Such form must include the required frequency of testing and acceptable tests that may be used.
- By an employee to document an exemption based on employer-provided personal protective equipment.

DEO is required to adopt emergency rules to implement the provisions relating to RA.

The bill also authorizes DOH and DEO to adopt emergency rules governing the prohibition on public employee COVID-19 vaccination mandates.

DLA is required to adopt emergency rules to implement complaint and notification processes, fines, investigations, and specifying the functional equivalent of termination.

The bill provides that notwithstanding the 90 day timeframe for emergency rules adopted the Administrative Procedures Act, emergency rules adopted are effective until replaced by rules adopted under regular rulemaking.

The bill requires DOH, DLA, and DEO to begin regular rulemaking under s.120.54(2) and (3), F.S., immediately after filing the emergency rules.

Nonrecurring Appropriation

The bill directs the Chief Financial Officer to immediately transfer \$5 million from the General Revenue Fund to a designated account within the DLA Operating Trust Fund. For the 2021-2022 fiscal year, the bill appropriates the nonrecurring sum of \$5 million to DLA from the Operating Trust Fund for complaint and investigation activities and for taking legal action to stop the enforcement of COVID-19 vaccination mandates imposed by the federal government.

The bill requires any monies remaining in the designated account on June 1, 2023, to be transferred to the General Revenue Fund unallocated.

Effective Date

The effective date of the bill is upon becoming a law, and the bill directs the Division of Law Revision to replace the phrase "the effective date of this act" wherever it occurs in this act with the date the act becomes a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill establishes a fine structure that shall be imposed by the AG if it is determined that an employer violates provisions of the bill relating to the termination of employees based on a COVID-19 vaccination mandate. The AG is required to impose a fine not exceeding thresholds established as follows:

- For an employer with fewer than 100 employees, \$10,000 per violation.

- For an employer with 100 or more employees, \$50,000 per violation.

Any revenue receipts from the imposition of fines must be deposited into the General Revenue Fund unallocated. The amount of revenue anticipated from the imposition of fines is indeterminate. To the extent that the Attorney General imposes such fines, the General Revenue Fund will experience an increase in revenue.

The bill prohibits an educational institution or a governmental entity from requiring an individual to be vaccinated against COVID-19 as a condition of employment. DOH is authorized to enforce this provision, including imposition of a fine not to exceed \$5,000 per violation and adoption of rules. To the extent an educational institution or a governmental entity violates the law, this could have a negative fiscal impact on such institution or entity. Any revenue receipts from the imposition of fines must be deposited into the General Revenue Fund. The amount of revenue anticipated from the imposition of fines is indeterminate. To the extent that the Attorney General imposes such fines, the General Revenue Fund will experience an increase in revenue.

2. Expenditures:

The bill provides for a transfer of \$5 million from the General Revenue Fund to a designated account within the Department of Legal Affairs Operating Trust Fund. Additionally, the bill appropriates \$5 million in nonrecurring funding from the Department of Legal Affairs Operating Trust Fund for the purpose of implementing provisions of the act relating to complaint investigation and legal action activities that may arise as a result of COVID-19 vaccination mandates imposed by the federal government.

The bill prohibits an educational institution or a governmental entity from requiring an individual to be vaccinated against COVID-19 as a condition of employment. DOH is authorized to enforce this provision, including imposition of a fine not to exceed \$5,000 per violation and rulemaking authority. This could have a negative fiscal impact on DOH expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Indeterminate. The bill prohibits educational institutions or governmental entities from requiring an individual to be vaccinated against COVID-19 as a condition of employment. DOH is authorized to impose a fine not to exceed \$5,000 per violation. This could have a negative fiscal impact on local school boards and local governmental entities to the extent these entities are found to be in violation.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

The number of complaint investigations that may be reviewed or instances of legal action that may be taken by the Department of Legal Affairs as a result of this legislation is indeterminate. The bill requires that any money remaining in the account as of June 1, 2023 to be transferred back to the General Revenue Fund unallocated.

