

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 2-B

INTRODUCER: Senator Burgess

SUBJECT: COVID-19 Mandates

DATE: November 12, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bond</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
2.	_____	_____	<u>AP</u>	_____

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**I. Summary:**

SB 2-B regulates COVID-19 mandates. The bill:

- Prohibits private employers from mandating COVID-19 vaccination without providing employees the ability to opt out of the mandate.
- Requires private employers that choose to impose a COVID-19 vaccination mandate to authorize all of the following exemptions: medical, which includes pregnancy or anticipated pregnancy; religious; COVID-19 immunity; periodic testing; or use of employer-provided personal protective equipment. These exemptions must be submitted to the employer on forms adopted by the Department of Health (DOH) or substantially similar forms.
- Authorizes the Attorney General to receive and investigate complaints and impose administrative fines of up to \$50,000 per violation, if an employee was terminated for refusing vaccination and the employer failed to follow the exemption procedures.
- Prohibits public educational institutions and governmental entities from requiring COVID-19 vaccination as a condition of employment and authorizes the DOH to impose a fine not to exceed \$5,000 per violation.
- Specifies that employees improperly terminated on the basis of COVID-19 vaccination mandates may be eligible for reemployment benefits, and establishes that reemployment benefits may not be denied or discontinued based on a new job offer that would require COVID-19 vaccination.
- Prohibits educational institutions and elected or appointed local officials from mandating COVID-19 vaccination for students, allows parents and students to bring an action against educational institutions for declaratory and injunctive relief, and requires courts to award attorney fees and court costs to prevailing parents and students.
- Prohibits school boards and local officials from requiring students to wear a face mask, face shield, or other face covering without providing for parental exemption from such requirements and limits the quarantining of asymptomatic students and teachers for exposure to COVID-19.

- Appropriates \$5 million from the General Revenue Fund for the Department of Legal Affairs 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 Section V.

The bill is effective upon becoming a law.

## II. Present Situation:

### COVID-19

The COVID-19 pandemic has drastically affected the state since the outbreak began affecting the United States in early 2020. The toll on individuals, businesses, and the economy has been severe. Governor DeSantis issued Executive Order No. 20-52 on March 9, 2020, declaring a state of emergency and issuing guidelines to halt, mitigate, or reduce the spread of the outbreak. The order was extended several times, the last by Executive Order No. 21-94, issued on April 27, 2021, which expired in June 2021.

In general, the methods for the prevention of contracting COVID-19 have been washing hands, wearing a face mask or other covering for a person's nose and mouth, social distancing, cleaning and disinfecting "high-touch" surfaces, improving ventilation, and receiving a COVID-19 vaccination.<sup>1</sup> The federal Food and Drug Administration (FDA) first issued emergency authorized use for COVID-19 vaccinations in December 2020; in August 2021, the FDA fully approved the first vaccine, produced by Pfizer, for use in individuals 16 years of age and older (emergency use for children 5 through 15 years of age is also available as is a "booster" shot for certain individuals).<sup>2</sup> COVID-19 vaccines are readily available and to-date in Florida nearly 14 million people have been vaccinated.<sup>3</sup>

### Recommended or Required Vaccines

Vaccines have routinely been recommended for various reasons in the United States. For example, the Centers for Disease Control and Prevention (CDC) provides recommendations for vaccinations for travel abroad, and the U.S. Department of State notes that some countries require that travelers carry proof of certain inoculations.<sup>4</sup> Additionally, the CDC recommends

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<sup>1</sup> Florida Department of Health (FDOH), Florida COVID-19 Response, *How do I prevent and prepare for COVID-19?*, available at <https://floridahealthcovid19.gov/prevention/> (last visited Nov. 10, 2021).

<sup>2</sup> See U.S. Food and Drug Administration, COVID-19 Frequently Asked Questions, *Q: What is the FDA's role in approving vaccines and what is being done to produce a COVID-19 vaccine?*, available at <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-frequently-asked-questions> (last visited Nov. 10, 2021). Emergency use for the Pfizer and Moderna vaccines was first issued in December 2020, and for the Janssen (Johnson and Johnson) vaccine in February 2021.

<sup>3</sup> FDOH, Florida COVID-19 Response, *COVID-19 Vaccines in Florida*, available at <https://floridahealthcovid19.gov/vaccines/> (last visited Nov. 10, 2021).

<sup>4</sup> See generally U.S. Department of State, Travel.State.Gov, *Your Health Abroad*, available at <https://travel.state.gov/content/travel/en/international-travel/before-you-go/your-health-abroad.html> (last visited Nov. 10, 2021).

vaccines for children, adults, and travelers and publishes schedules for recommendations for specific vaccines, including the age at which a person should receive them.<sup>5</sup>

Vaccines have also been required for certain activities, such as for enrollment and attendance at school. Such vaccines include diphtheria-tetanus-acellular pertussis (DTaP), inactivated polio vaccine (IPV), measles-mumps-rubella (MMR), varicella (chickenpox), haemophilus influenzae type b (Hib), pneumococcal conjugate (PCV13), and hepatitis B (Hep B).<sup>6</sup> Medical and religious exemptions are generally allowed for required vaccinations.<sup>7</sup>

Currently, the CDC recommends primary COVID-19 vaccinations for people aged 5 years and older and booster shots for some people aged 18 years and older who are at higher risk for COVID-19 exposure or severe illness or who received the one-dose Janssen vaccine.<sup>8</sup>

### ***COVID-19 Vaccination Mandates for Employment***

Since the FDA's full approval of COVID-19 vaccinations, some employers have begun to mandate vaccination.<sup>9</sup> For example on August 6, 2021, United Airlines became the first major airline to announce a COVID-19 vaccination mandate for its employees.<sup>10</sup> The airline terminated more than 230 employees who have not complied with the mandate.<sup>11</sup> In response to employer COVID-19 vaccination mandates, some states have restricted the use of such mandates. Seven of these states ban state entities imposing vaccine mandates on employees; while one state, Montana, bans both public and private employers from imposing vaccine mandates.<sup>12</sup>

The Occupational Safety and Health Administration (OSHA) is a regulatory agency within the United States Department of Labor, created "to ensure safe and healthful working conditions for workers by setting and enforcing standards and by providing training, outreach, education and

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<sup>5</sup> Centers for Disease Control and Prevention (CDC), *Vaccines & Immunizations*, (last reviewed February 16, 2021), available at <https://www.cdc.gov/vaccines/> (last visited Nov. 10, 2021).

<sup>6</sup> See FDOH, *School Immunizations Requirements*, (last reviewed March 8, 2021), available at <http://www.floridahealth.gov/programs-and-services/immunization/children-and-adolescents/school-immunization-requirements/index.html> (last visited Nov. 10, 2021). See also CDC, *Vaccines for Your Children, Required Vaccines for Child Care and School*, (last reviewed May 17, 2019), available at <https://www.cdc.gov/vaccines/parents/records/schools.html> (last visited Nov. 10, 2021).

<sup>7</sup> See FDOH, *Exemption from Required Immunizations*, (last reviewed March 27, 2021), available at <http://www.floridahealth.gov/programs-and-services/immunization/children-and-adolescents/immunization-exemptions/index.html> (last visited Nov. 10, 2021). Section 381.003(1)(e), F.S.

<sup>8</sup> CDC, COVID-19, *COVID-19 Vaccines for Specific Groups of People* (last updated November 3, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/specific-groups.html> (last visited Nov. 10, 2021); see also CDC, *Some COVID-19 Vaccine Recipients Can Get Booster Shots* (last updated November 9, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html> (last visited Nov. 10, 2021).

<sup>9</sup> NBC News, *From McDonald's to Goldman Sachs, here are the companies mandating vaccines for all or some employees* (August 3, 2021), available at <https://www.nbcnews.com/business/business-news/here-are-companies-mandating-vaccines-all-or-some-employees-n1275808> (last visited Nov. 10, 2021).

<sup>10</sup> United, *COVID-19 vaccine required for United employees*, (Aug. 6, 2021) available at <https://www.united.com/en/us/newsroom/announcements/COVID-19-vaccine-required-for-United-employees> (last visited Nov. 8, 2021).

<sup>11</sup> Fox Business, *United Airlines in the process of firing 232 unvaccinated employees* (October 13, 2021) available at <https://www.foxbusiness.com/lifestyle/united-airlines-firing-unvaccinated-employees> (last visited Nov. 8, 2021).

<sup>12</sup> Littler, *COVID-19 Resources, Mandatory Employee Vaccines – Coming to A State Near You?* (current as of November 10, 2021), available at <https://www.littler.com/publication-press/publication/mandatory-employee-vaccines-coming-state-near-you> (last visited Nov. 10, 2021).

assistance.”<sup>13</sup> The Occupational Safety and Health Act (OSH Act) regulates most private sector employers as well as certain public sector employers. The OSH Act applies to employees of an organization, and does not apply to self-employed workers, immediate family members of farm employers, volunteers, or unpaid students.<sup>14</sup> The OSHA is authorized to set emergency temporary standards in certain limited circumstances which take effect immediately and are in effect until superseded by a permanent standard. “OSHA must determine that workers are in grave danger and that an emergency standard is needed to protect them. Then, OSHA publishes the emergency temporary standard in the Federal Register, where it also serves as a proposed permanent standard.” The validity of an emergency temporary standard may be challenged in a U.S. Court of Appeals.<sup>15</sup>

On November 5, 2021, OSHA published an emergency temporary standard that requires every employer having 100 or more employees to implement a COVID-19 vaccination mandate.<sup>16</sup> All employers having 100 or more employees must ensure that their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work and to wear personal protective equipment. Employees may be exempt from the requirement due to religious beliefs or having a severe allergic reaction to the vaccine or its ingredients. These employers are also required to provide paid time off to employees who decide to be vaccinated, to allow the employee time to receive the vaccination and recover in the event of experiencing any short-term side effects from the shot. The penalty for violation of the emergency temporary standard is up to \$14,000 per violation. The employer must comply with the emergency temporary standard by January 4, 2022. The OSHA estimated that the total cost per entity to comply with the emergency temporary standard is \$11,298 per entity, for an estimated total of nearly \$3 billion.<sup>17</sup> As of October 4, 2021, OSHA estimated that 61.3 percent of covered employees are fully vaccinated.<sup>18</sup>

On November 5, 2021, the federal Centers for Medicare and Medicaid Services (CMS) published an interim final rule to require that a healthcare employer<sup>19</sup> participating in Medicare or Medicaid implement a COVID-19 vaccination mandate.<sup>20</sup> The vaccination mandate applies to employees, licensed practitioners, students and trainees, volunteers, and contractors (individuals who provide care, treatment, or other services for the provider and/or its residents, under contract

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<sup>13</sup> Occupation Health and Safety Administration (OSHA), United States Department of Labor, *About OSHA*, <https://www.osha.gov/aboutosha> (last visited Nov. 4, 2021).

<sup>14</sup> OSHA, *All About OSHA*, 8, [https://www.osha.gov/sites/default/files/publications/all\\_about\\_OSHA.pdf](https://www.osha.gov/sites/default/files/publications/all_about_OSHA.pdf) (last visited Nov. 4, 2021.)

<sup>15</sup> OSHA, *OSHA Standards Development*, available at <https://www.osha.gov/laws-regs/standards-development> (last visited Nov. 11, 2021).

<sup>16</sup> 86 Fed. Reg. 61402 (Nov. 5, 2021).

<sup>17</sup> *Id.* at Table IV.B.13., p. 61493.

<sup>18</sup> *Id.* at Table IV.B.6., p. 61471.

<sup>19</sup> The following entities are included: ambulatory surgical centers (ASCs); hospices; psychiatric residential treatment facilities; programs of all-inclusive care for the elderly (PACE); hospitals; long term care facilities; 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.

<sup>20</sup> 86 Fed. Reg. 61555 (Nov. 5, 2021).

or by other arrangement).<sup>21</sup> A person may be exempt from the requirement due to religious beliefs or having a severe allergic reaction to the vaccine or its ingredients.

On September 29, 2021, the President issued an Executive Order requiring that every new federal contract after October 15, 2021, include a requirement to impose a COVID-19 vaccination requirement on the employees of federal contractors.<sup>22</sup>

### **Employment in Florida**

Florida is an “at will” state. This means that where there is not an agreed upon, definite term of employment, an employment agreement is terminable at the will of either the employer or the employee without cause. “An at-will employee may be discharged at any time as long as he or she is not terminated for a reason prohibited by law such as retaliation or unlawful discrimination.”<sup>23</sup>

“An employer owes its employees the duty to furnish a reasonably safe place in which to work.”<sup>24</sup> On May 28, 2021, the federal Equal Employment Opportunity Commission (EEOC) released technical assistance related to the COVID-19 pandemic which 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.<sup>25</sup>

The COVID-19 technical assistance only addresses questions from the perspective of the federal equal employment opportunity (EEO) laws. It does not cover other federal, state, or local laws that may be related to the COVID-19 pandemic for employers and employees. The technical assistance states:

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,

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<sup>21</sup> 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.

<sup>22</sup> *Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors* (September 9, 2021), available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/> (last visited Nov. 8, 2021). See Safer Federal Workforce, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, available at <https://www.saferfederalworkforce.gov/overview/> (last visited Nov. 10, 2021).

<sup>23</sup> 2A Fla. Jur 2d Agency and Employment 199.

<sup>24</sup> 2A Fla. Jur 2d Agency and Employment 252.

<sup>25</sup> Equal Employment Opportunity Commission, *EEOC Issues Updated Covid-19 Technical Assistance* (May 28, 2021) available at <https://content.govdelivery.com/accounts/USEEOC/bulletins/2e1bfc4> (last visited Nov. 8, 2021).

some employees may be more likely to be negatively impacted by a vaccination requirement.<sup>26</sup>

## **COVID-19 Vaccination, Mask, and Quarantine Requirements in Schools**

### ***Vaccination & Immunization Requirements in Schools***

The Department of Health (DOH) administers a program for the immunization against, the testing for, and the control of preventable communicable diseases for children in the state.<sup>27</sup> For school admission or attendance, a child must obtain the following vaccinations.

- Diphtheria, tetanus, and pertussis.
- Polio.
- Measles, mumps, rubella (MMR).
- Haemophilus influenza type b (Hib).
- Hepatitis B.
- Varicella (Chickenpox).<sup>28</sup>

The DOH also requires meningococcal meningitis and hepatitis B vaccinations for individuals residing in on-campus housing of a postsecondary educational institution, and recommends them for every student.<sup>29</sup> Other than this requirement, current law does not require any vaccination for an adult.

### ***Exemptions from Immunization and Health Requirements***

The DOH is required to provide procedures for exempting a child from school-entry immunization requirements.<sup>30</sup> Additionally, current law authorizes parents to opt their children out of immunization requirements. Under these procedures:

- Public and private school entry health examinations and school immunization requirements do not apply if:
  - A physician licensed under ch. 458, F.S., or ch. 459, F.S., certifies in writing that the child should be permanently exempt from the required immunization for medical reasons stated in writing, based upon valid clinical reasoning or evidence, demonstrating the need for the permanent exemption;<sup>31</sup>
  - A physician licensed under ch. 458, F.S., ch. 459, F.S., or ch. 460, F.S., certifies in writing that the child has received as many immunizations as are medically indicated at the time and is in the process of completing necessary immunizations;<sup>32</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> Section 1003.22, F.S.

<sup>28</sup> FDOH, *Immunization Guidelines: Florida Schools, Childcare Facilities, and Family Daycare Homes* (March 2013) incorporated by reference in Rule 64D-3.046, F.A.C., <http://www.floridahealth.gov/programs-and-services/immunization/children-and-adolescents/documents/school-guide.pdf> (last visited Nov. 10, 2021). The schedule and the number of doses required varies by age.

<sup>29</sup> Section 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.

<sup>30</sup> Section 1003.22, F.S.

<sup>31</sup> Section 1003.22(5)(b), F.S.

<sup>32</sup> Section 1003.22(5)(c), F.S.



- The DOH determines that, according to recognized standards of medical practice, any required immunization is unnecessary or hazardous; or<sup>33</sup>
- An authorized school official issues a temporary exemption, for up to 30 school days, to permit a student who transfers into a new county to attend class until his or her records can be obtained.<sup>34</sup>
- Children in childcare facilities may be exempt from medical or physical examination or medical or surgical treatment upon written request of the parent or guardian who objects to the examination and treatment. However, the laws, rules, and regulations relating to contagious or communicable diseases and sanitary matters may not be violated because of any exemption from or variation of the health and immunization minimum standards.<sup>35</sup>
- Individuals who apply to participate in the temporary family assistance (TANF) program are exempt from the requirement to have their children’s childhood immunization completed if the failure to immunize the child is because of religious reasons or other good cause, as defined in rules adopted by the Department of Children and Families.<sup>36</sup>
- Parents may opt their children out of public and private school entry health examinations or school immunization requirements by submitting a written request stating objections on religious grounds.<sup>37</sup>

### ***Immunization Records***

The DOH is required to maintain an electronic registry of immunizations. The Florida State Health Online Tracking System (SHOTS) is the statewide, online immunization registry employed by the DOH to track immunization records. Only authorized health care practitioners, schools, childcare providers, and parents may access the system. A health care practitioner voluntarily enrolls to access SHOTS and, once enrolled, may upload patient immunization history into the system.<sup>38</sup> A health care practitioner who provides an immunization that is required for school admission or attendance submits that information to SHOTS or documents the immunization on a Florida Certification of Immunization Form. The DOH must maintain the confidentiality of the information stored in SHOTS, and any health care practitioner or other agency that obtains such information must maintain the confidentiality.<sup>39</sup> The DOH uses SHOTS to record data on COVID-19 vaccinations provided by practitioners.<sup>40</sup>

### ***Mask & Quarantine Requirements in Schools***

COVID-19 infection “is transmitted predominately by inhalation of respiratory droplets generated when people cough, sneeze, sing, talk, or breathe.”<sup>41</sup> The federal CDC recommends that schools implement strategies for lowering the chance of COVID-19 transmission in schools,

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<sup>33</sup> Section 1003.22(5)(d), F.S.

<sup>34</sup> Section 1003.22(5)(e), F.S.

<sup>35</sup> Section 402.305(9)(e), F.S.

<sup>36</sup> Section 414.13, F.S.

<sup>37</sup> Sections 1002.20(3)(a)-(b) and 1003.22(5)(a), F.S.

<sup>38</sup> FDOH, Frequently Asked Questions, available at <http://www.floridahealth.gov/programs-and-services/immunization/immunization-faq.html> (last visited Nov. 10, 2021).

<sup>39</sup> Section 381.003(1)(e), F.S.

<sup>40</sup> FDOH, *COVID-19: Vaccine Reporting Requirements*, Emergency Rule 64DER21-4, F.A.C.

<sup>41</sup> CDC, *COVID-19, Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, available at <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov-2.html> (last accessed Nov. 9, 2021).

and mask and quarantine mandates are two of those strategies.<sup>42</sup> Over the course of the pandemic, many local school districts imposed mask mandates and quarantine policies as a part of their reopening plan.

On July 30, 2021, the Governor issued an executive order directing the Department of Health and the Department of Education to work together to adopt emergency rules to address COVID-19 in schools, including mask and quarantine requirements for students.<sup>43</sup>

On August 6, 2021, the DOH published an emergency rule requiring schools to allow a parental opt-out of any student mask mandate.<sup>44</sup> The rule was amended on September 22, 2021.<sup>45</sup> As amended, the rule clarifies that the opt-out for masks is at the sole discretion of the parent and revises the requirements for quarantining students who may have been exposed to COVID-19, but who are asymptomatic. According to the 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, the 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. The 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.”<sup>46</sup>

The emergency rule was upheld by an administrative law judge, who found that while children can be infected by COVID-19, children are unlikely to suffer serious side effects from COVID-19. The administrative law judge found the testimony that “for children up to 19 years old, a child infected with COVID survives 99.997 percent of the time” to be well-supported and credible<sup>47</sup> and found that “it was not proven that masks provide any significant protection to children against COVID-19.”<sup>48</sup> Furthermore, the administrative law judge found that a comparison between schools with and without mask mandates offered no statistically significant difference in protection against COVID-19.<sup>49</sup>

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<sup>42</sup> CDC, COVID-19, *Guidance for COVID-19 Prevention in K-12 Schools #2*, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> (last accessed Nov 5, 2021).

<sup>43</sup> *Ensuring Parents’ Freedom to Choose - Masks in Schools*, Executive Order 21-175 (July 30, 2021), available at [https://www.flgov.com/wp-content/uploads/orders/2021/EO\\_21-175.pdf](https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-175.pdf).

<sup>44</sup> FDOH, *Protocols for Controlling COVID-19 in School Settings*, Rule 64DER21-12, F.A.C., available at <https://www.flgov.com/wp-content/uploads/2021/08/8.6.21-DOH-Rule.pdf>.

<sup>45</sup> FDOH, *Protocols for Controlling COVID-19 in School Settings*, Rule 64DER21-15, F.A.C., available at <https://floridahealthcovid19.gov/wp-content/uploads/2021/09/64DER21-15.pdf>.

<sup>46</sup> *Id.*

<sup>47</sup> *School Board of Miami-Dade County, Florida, et.al., v. Department of Health*, DOAH Case No. 21-3066 (Final Order, Nov. 5, 2021), at page 14, available at <https://www.doah.state.fl.us/ROS/2021/21003066.pdf> (internal quotations omitted).

<sup>48</sup> *Id.* at 15.

<sup>49</sup> *Id.*



## Florida Attorney General

The Attorney General (AG) is the state's chief legal officer.<sup>50</sup> The AG is tasked with duties prescribed by the State Constitution and those duties appropriate to her office as may be required by law,<sup>51</sup> including:

- Appearing in, on behalf of the state, all suits or prosecutions in which the state is a party or in any way interested.<sup>52</sup>
- Acting as co-counsel of record in capital collateral proceedings.<sup>53</sup>
- Serving as a member of the cabinet.<sup>54</sup>
- Exercising a general superintendence and direction over the several state attorneys of the state judicial circuits as to the manner of discharging their official duties.<sup>55</sup>
- Performing all powers and duties incident to her office.<sup>56</sup>

## Department of Legal Affairs

The Department of Legal Affairs (DLA) is a state department headed by the AG.<sup>57</sup> The AG is responsible for overseeing the various prosecutorial and enforcement functions of the DLA.<sup>58</sup> The DLA's functions in part include:

- Providing all legal services required by any state department or agency where required by law.<sup>59</sup>
- Investigating and prosecuting various criminal offenses through the Office of Statewide Prosecution.<sup>60</sup>
- Investigating and initiating actions authorized by ch. 760, F.S., through the Office of Civil Rights, including the Florida Civil Rights Act and the Fair Housing Act.<sup>61</sup>
- Investigating all violations relating to Medicaid provider fraud and any related criminal violations discovered during such investigations through the Medicaid Fraud Control Unit.<sup>62</sup>
- Instituting civil actions to enforce other state laws, including the:
  - Florida Deceptive and Unfair Trade Practices Act.<sup>63</sup>
  - Florida False Claims Act.<sup>64</sup>
  - State public nuisance laws.<sup>65</sup>

<sup>50</sup> FLA. CONST. art. IV, s. 4.

<sup>51</sup> *Id.*; s. 16.01(2), F.S.

<sup>52</sup> Section 16.01, F.S.

<sup>53</sup> Capital collateral proceedings are proceedings following an affirmed criminal conviction and death sentence imposed by a trial court, including any appellate review of the sentence. Sections 16.01(6) and 27.711(1)(c), F.S.

<sup>54</sup> The cabinet is an executive branch body that engages in the collective governance of the state. Other cabinet members include the chief financial officer, the commissioner of agriculture, and the governor. FLA. CONST. art. IV, s. 4.

<sup>55</sup> Section 16.08, F.S.

<sup>56</sup> Section 16.01(7), F.S.

<sup>57</sup> Section 20.11, F.S.

<sup>58</sup> Section 16.015, F.S.

<sup>59</sup> *Id.*

<sup>60</sup> Section 16.56, F.S.

<sup>61</sup> Section 16.57, F.S.

<sup>62</sup> Section 16.59, F.S.

<sup>63</sup> Part II, ch. 501, F.S.

<sup>64</sup> Section 68.083, F.S.

<sup>65</sup> Section 823.05, F.S.

- Environmental Protection Act.<sup>66</sup>

### **Administrative Procedures Act**

Chapter 120, F.S., is the state’s Administrative Procedures Act. It is a comprehensive administrative process that requires agencies to follow uniform procedures when enacting rules and issuing orders and allows individuals to challenge agency decisions.<sup>67</sup>

The term “agency action” includes an order or its equivalent issued by an agency. “An agency will provide notice of the intended decision to substantially affected persons, and such notice must contain a statement of the right to challenge the intended decision. Unless challenged, the preliminary agency decision becomes final 21 days from the point of notice to persons with standing to contest the action.”<sup>68</sup>

Petitions for hearings to contest agency decisions must contain specific information required by statute and the Uniform Rules of Procedure. All such petitions requesting hearings are filed with the agency, and those requests that contain material fact disputes are referred to [the Division of Administrative Hearings], while those that do not are heard by agency personnel assigned as hearing officers. A petition heard at DOAH is assigned to an [administrative law judge] who issues a recommended order at the conclusion of the hearing. The case is then returned to the agency for entry of a final order. Hearing officers also issue recommended orders and the agency head typically issues the final order. All final orders are subject to appeal to district courts of appeal.<sup>69</sup>

### **III. Effect of Proposed Changes:**

#### **Private Employer COVID-19<sup>70</sup> Vaccination Mandates (Section 1, creating s. 381.00317, F.S.)**

The bill prohibits private-employer vaccination mandates for full-time, part-time, or contract employees which do not provide individual exemptions that allow the employee to opt out of the mandate. The bill also prohibits an employer from imposing a policy prohibiting an employee from receiving a COVID-19 vaccination.

<sup>66</sup> Section 403.412, F.S.

<sup>67</sup> Florida Legislature, Joint Administrative Procedures Committee, *A Primer on Florida’s Administrative Procedures Act*, 2, available at <https://www.japc.state.fl.us/Documents/Publications/PocketGuideFloridaAPA.pdf> (last visited Nov. 10, 2021).

<sup>68</sup> The Florida Bar, Robert C. Downie II, *Florida Administrative Procedures Act Remedies Survey*, Vol. 81, No. 7 (July/August 2007), available at <https://www.floridabar.org/the-florida-bar-journal/florida-administrative-procedures-act-remedies-survey/> (last visited Nov. 10, 2021).

<sup>69</sup> *Id.* (citations omitted). Section 120.569, F.S., contains provisions applicable to all three types of hearings. Section 120.57(1), F.S., contains additional procedures for hearings that involve disputed issues of material fact, or formal hearings. Section 120.57(2), F.S., applies to hearings without material factual disputes, or informal hearings. Section 120.57(3), F.S., applies to contract solicitation or award protests, both formal and informal. *Id.*

<sup>70</sup> For purposes of the bill, COVID-19 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.” This is the same definition currently in s. 768.381, F.S.

The bill establishes a minimum of five exemptions that an employer must offer if the employer imposes a COVID-19 vaccination mandate:

- Medical reasons (including pregnancy or anticipated pregnancy);
- Religious beliefs;
- COVID-19 immunity;
- Agreement to comply with periodic testing; and
- Agreement to comply with using employer-provided personal protective equipment.

To claim an exemption, the employee must submit an exemption statement to the employer. Employers are required to use forms adopted by the Department of Health (DOH) or substantially similar forms. An employer that receives a completed exemption statement from an employee must allow the employee to opt out of the employer's COVID-19 vaccination mandate.

### *Exemptions*

To claim an exemption based on medical reasons, which include but are not limited to pregnancy or anticipated pregnancy, the submitted exemption statement must be dated and signed by a Florida-licensed physician, physician assistant (PA), or advanced practice registered nurse (APRN) who has examined the employee.<sup>71</sup> The statement must provide that in the professional opinion of the physician, PA, or APRN, the vaccination is not in the best medical interest of the employee.

To claim an exemption based on religious beliefs, the submitted exemption statement must indicate that the employee declines the vaccination because of a sincerely held religious belief.

To claim an exemption based on COVID-19 immunity, the submitted exemption statement must demonstrate competent medical evidence that the employee has immunity to COVID-19, documented by the results of a valid laboratory test performed on the employee.

To claim an exemption based on periodic testing, the submitted exemption statement must indicate that the employee agrees to comply with regular testing for the presence of COVID-19. Testing must be done at no cost to the employee.

To claim an exemption based on use of personal protective equipment (PPE), the submitted exemption statement must indicate that the employee agrees to comply with the employer's reasonable written requirement to use PPE. The employer must provide the PPE.

An employee can file a complaint with the Department of Legal Affairs (DLA) if he or she alleges that the employer is not offering a required exemption, has improperly applied the exemption, or has improperly denied the exemption to the employee. If the DLA investigates the complaint and finds that the allegation was valid, then the DLA must notify the employer of the determination and allow the employer the opportunity to cure the noncompliance.

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<sup>71</sup> The physician or PA must hold a valid, active license under chs. 458 or 459, F.S. The APRN must hold a valid, active license under ch. 464, F.S.

### ***Terminated Employees***

An employer may be subject to fines under the bill if the employer institutes a vaccine mandate, but fails to offer or properly recognize the exemptions specified in the bill and terminates an employee based on its vaccine mandate. Moreover, termination includes the functional equivalent of termination.<sup>72</sup>

A terminated employee may file a complaint with the DLA, alleging that the employer did not offer an exemption, improperly applied the exemption, or improperly denied the exemption to the employee, resulting in the employee's termination. The DLA must conduct an investigation into the complaint and must, at a minimum, determine whether:

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

If the Attorney General finds that the employee was improperly terminated, the Attorney General must impose an administrative fine, per violation of a wrongful termination, of up to \$10,000 for an employer that has fewer than 100 employees or up to \$50,000 for an employer that has 100 or more employees. However, the Attorney General may not impose a fine on an employer that reinstates the terminated employee with back pay to the date that the complaint of wrongful termination was received by the DLA. Fines collected are deposited in the General Revenue Fund.

The Attorney General, when assessing a fine against an employer, may consider whether the employer:

- Knowingly and willfully violated the law;
- Has shown good faith in attempting to comply with the law;
- Has taken action to correct the violation; and
- Has previously been assessed a fine for violating the law.

The Attorney General may also consider any other mitigating or aggravating factor that fairness or due process requires.

The decision of the Attorney General constitutes agency action for purposes of ch. 120, F.S., the state's Administrative Procedures Act, which sets forth procedures for challenges to an agency's decision.

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<sup>72</sup> For example, under the legal theory of "constructive termination" the courts recognize "that employers have ways of forcing workers out without actually firing them, courts have looked to whether the employer's actions, practices, or course of conduct, under all the facts and circumstances, made working conditions so intolerable that a reasonable person would have felt compelled to resign... At a minimum, the employee must show a significantly adverse change in working conditions. Such changes may include demotion, a freeze or cut in pay, on-the-job harassment, a reassignment to meaningless or menial duties, unreasonably onerous working conditions, a transfer to a remote job site, the infliction of humiliation, or some combination of these or similar factors." 33 Am. Jur. Proof of Facts 3d 235 (Originally published in 1995).

***Emergency Rulemaking***

The bill authorizes the DOH and the DLA to adopt emergency rules to implement the provisions of the bill. The emergency rules remain in effect until rules are filed under the regular rulemaking process.

The emergency rules must be filed within 15 days after the effective date of the bill. All existing employer COVID-19 vaccination mandates are considered invalid for 15 days after the effective date of the bill or until the emergency rules are filed by the DOH, whichever occurs first.

The DOH must adopt rules to:

- Specify the circumstances that are considered an anticipated pregnancy, including, but not limited to, a maximum timeframe within which one anticipates pregnancy for the purposes of claiming an exemption.
- Specify the standard for demonstrating competent medical evidence of COVID-19 immunity.
- Specify requirements for the frequency and methods of testing which may be used by employers.
- Create forms for the exemption statements.<sup>73</sup>

The DLA must adopt rules to:

- Prescribe the complaint and notification processes; and
- Specify the functional equivalent of termination.

***Appropriation (Section 4)***

The bill directs the transfer of \$5 million from the General Revenue Fund to a designated account in the Operating Trust Fund in the DLA; any funds remaining in the account on June 1, 2023, revert back to the General Revenue Fund. The bill appropriates \$5 million from the DLA Operating Trust Fund for Fiscal Year 2021-2022 for complaint and investigation activities and for taking legal action to stop the enforcement of COVID-19 vaccination mandates imposed by the federal government.

**Public Employer COVID-19 Vaccination Mandates (Section 3, creating s. 112.0441, F.S.)**

Under the bill, a governmental entity<sup>74</sup> is prohibited from imposing a COVID-19 vaccination mandate for any full time, part-time, or contract employee. Any existing ordinance, rule, or policy imposing such a mandate is null and void as of the effective date of the bill. The DOH may impose a fine of up to \$5,000 against the governmental entity for each employee subject to

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<sup>73</sup> The exemption statement for the COVID-19 immunity opt-out must include the laboratory criteria for proof of immunity; and the exemption statement for the periodic testing opt-out must include the required frequency of testing and acceptable tests that may be used. Employers are required to use these forms or substantially similar ones if the employers elect to impose a COVID-19 vaccination mandate.

<sup>74</sup> A governmental entity is 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. (the “Sunshine” law, which generally applies to any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision. See Office of the Attorney General, *Government-In-The-Sunshine Manual*, 2021 Edition, vol. 43). Section 768.38, F.S.

the vaccination mandate. Fines collected are deposited in the General Revenue Fund. The DOH is also authorized to adopt emergency rules to implement this law; the emergency rules remain in effect until rules are filed under the regular rulemaking process. The emergency rules must be filed within 15 days after the effective date of the bill.

**Educational Institution COVID-19 Vaccination Mandates (Section 2, creating s. 381.00319, F.S., and Section 3, creating s. 112.0441, F.S.)**

Under the bill, an educational institution may not impose a COVID-19 vaccination mandate on students or employees. An educational institution is 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.

***Employees***

An educational institution is prohibited from imposing a COVID-19 vaccination mandate for any full time, part-time, or contract employee. Any existing ordinance, rule, or policy imposing such a mandate is null and void as of the effective date of the bill. The DOH may impose a fine of up to \$5,000 against the educational institution for each employee subject to the vaccination mandate. Fines collected are deposited in the General Revenue Fund.

The DOH is also authorized to adopt emergency rules to implement this law; the emergency rules remain in effect until rules are filed under the regular rulemaking process. The emergency rules must be filed within 15 days after the effective date of the bill.

***Students and Cause of Action***

An educational institution or an elected or appointed local official is prohibited from imposing a COVID 19 vaccination mandate for any student. The bill authorizes a parent<sup>75</sup> of a student, a student who is an emancipated minor, or a student who is 18 years of age or older to bring a cause of action against the educational institution to obtain a declaratory judgment that an act or practice violates this prohibition and an injunction. The prevailing parent or student must be awarded attorney's fees and court costs.

**Reemployment Assistance for Terminated Employees (Section 1, creating s. 381.00317, F.S., and Section 3, creating s. 112.0441, F.S.)**

If an employee of a private employer, educational institution, or governmental entity is terminated for noncompliance with the employer's COVID-19 vaccination mandate, then the employee may be eligible for reemployment assistance benefits under ch. 443, F.S.

Under current law, an individual may be disqualified for reemployment assistance benefits if the Department of Economic Opportunity finds that the individual was discharged or suspended by

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<sup>75</sup> Section 1000.21(5), F.S., defines the term "parent" as "either or both parents of a student, any guardian of a student, any person in a parental relationship to a student, or any person exercising supervisory authority over a student in place of the parent."



the employer for misconduct associated with his or her work.<sup>76</sup> Under the bill, an employee's refusal to comply with the employer's COVID-19 vaccination mandate may not be deemed misconduct, if the:

- Private employer does not offer and properly apply the exemptions required to impose a COVID-19 vaccination mandate and terminates the employee for refusing to comply with the mandate; or
- Educational institution or governmental entity employer terminates the employee for refusing to comply with any COVID-19 vaccination mandate.

Under current law, each qualified individual must report at least biweekly to receive reemployment assistance benefits and to attest to the fact that she or he is able and available for work, has not refused suitable work, and is seeking work.<sup>77</sup> For any week for which the Department of Economic Opportunity finds that the individual has failed without good cause to apply for available suitable work or accept suitable work when offered to him or her, the person may be disqualified for benefits for the weeks claimed.<sup>78</sup> Under the bill, work is not deemed suitable and benefits may not be denied for a terminated employee for refusing to accept new work if the terminated employee is otherwise eligible and the position requires compliance with a COVID-19 vaccination mandate contrary to the provisions on vaccination mandates created by the bill.

The Department of Economic Opportunity is authorized to adopt emergency rules to implement this law; the emergency rules remain in effect until rules are filed under the regular rulemaking process. The emergency rules must be filed within 15 days after the effective date of the bill.

**Prohibition of Student Mask Mandates and Quarantine Mandates (Section 5, creating s. 1002.20(3)(n), F.S.)**

Under the bill, a district school board, a district school superintendent, an elected or appointed local official, or any district school board employee may not require a student to wear a face mask, face shield, or any other facial covering that fits over the mouth or nose. (This prohibition does not apply to safety equipment required as part of a course of study consistent with occupational or laboratory safety requirements.) However, a parent, at the parent's sole discretion, can allow his or her student to wear a facial covering.

Additionally, for any student exposed to COVID-19, the bill prohibits a district school board, a district school superintendent, an elected or appointed local official, or any district school board employee from:

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<sup>76</sup> Section 443.101(1), F.S. Misconduct includes conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee; and a violation of an employer's rule. See s. 443.036, F.S., and Rule 73B-11.020 (Determinations Regarding Discharge for Misconduct), F.A.C.

<sup>77</sup> Sections 443.091(1)(d) and 443.111(1)(b), F.S. "Available for work" means actively seeking and being ready and willing to accept suitable work. Section 443.036(6), F.S.

<sup>78</sup> In determining whether or not any work is suitable for an individual, the Department of Economic Opportunity must consider the degree of risk to the individual's health, safety, and morals. Section 443.101(2), F.S. The statute also sets forth conditions for when work is not deemed suitable and benefits may not be denied to any otherwise eligible individual for refusing to accept new work.

- Prohibiting a student from attending school or school-sponsored activities;
- Prohibiting a student from being on school property; or
- Subjecting the student to restrictions or disparate treatment.

However, this prohibition only applies so long as the student remains asymptomatic and has not received a positive test for the presence of COVID-19.

### *Cause of Action*

The bill authorizes a parent of a student, a student who is an emancipated minor, or a student who is 18 years of age or older to bring a cause of action against the educational institution to obtain a declaratory judgment that an act or practice violates this prohibition and an injunction. The prevailing parent or student must be awarded attorney's fees and court costs.

### **Prohibition of School Board Employee Quarantine Mandates (Section 5, creating s. 1002.20(3)(n), F.S.)**

Under the bill, for any employee exposed to COVID-19, the bill prohibits a district school board, a district school superintendent, an elected or appointed local official, or any district school board employee from:

- Prohibiting an employee from returning to work; or
- Subjecting the employee to restrictions or disparate treatment.

However, this prohibition only applies so long as the employee remains asymptomatic and has not received a positive test for the presence of COVID-19.

### **Effective Dates (Sections 6 and 7)**

The bill is effective upon becoming a law. The provisions of the bill expire June 1, 2023. The Division of Law Revision is directed to replace the phrase "the effective date of this act" wherever it occurs in the bill with the date that the bill becomes a law.

## **IV. Constitutional Issues:**

### A. Municipality/County Mandates Restrictions:

None.

### B. Public Records/Open Meetings Issues:

None.

### C. Trust Funds Restrictions:

None.

### D. State Tax or Fee Increases:

None.

**E. Other Constitutional Issues:**

The federal government announced plans to require many private employers to enact COVID-19 vaccination mandates. It is possible that such regulations may preempt portions of the bill.<sup>79</sup>

Whether a federal regulation preempts state law depends on whether the agency that prescribed the regulations meant to preempt state law, and, if so, whether that action is within the scope of the agency's delegated authority.<sup>80</sup> A state law is only preempted to the extent that it actually conflicts with federal law so that "compliance with both federal and state regulations is a physical impossibility."<sup>81</sup> Federal agencies have authority to issue regulations to the extent that the authority has been granted to the agency by an act of Congress. A regulation may not exceed the authority granted, and may not be arbitrary nor one that Congress would not have sanctioned.<sup>82</sup> Congress must clearly authorize regulations that have vast economic and political significance.<sup>83</sup> An agency attempt to exert broad new power over a significant portion of the American economy is suspect.<sup>84</sup>

**V. Fiscal Impact Statement:**

**A. Tax/Fee Issues:**

See Private Sector Impact.

**B. Private Sector Impact:**

SB 2-B provisions prohibiting businesses from requiring COVID-19 vaccination for employees may limit their ability to attract some types of customers and students and may prevent or delay full operation of some business, educational, and governmental activities.

Employers with existing COVID-19 vaccination mandates will need to modify their policies in order to comply with the requirements of the bill.

Students and parents may recover the costs related to pursuing an action to see a declaratory judgment and injunction to stop the imposition of mandates prohibited by the bill.

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<sup>79</sup> U.S. CONST. art. VI, cl. 2.

<sup>80</sup> *Drake v. Laboratory Corp. of America Holdings*, 458 F.3d 48 (2nd Cir. 2006).

<sup>81</sup> *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963) (declining to block California state law that discriminated against Florida produce in part based on lack of conflict between federal regulation and state law).

<sup>82</sup> *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982) (upholding federal regulation requiring due-on-sale clauses in certain home mortgages contrary to state law).

<sup>83</sup> *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (invalidating federal regulation by the Centers for Disease Control creating a COVID-19-related eviction moratorium).

<sup>84</sup> *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) (invalidating federal regulation by the Environmental Protection Agency limiting greenhouse gas emissions).

Some employers may incur costs related to resolving complaints related to COVID-19 vaccination mandates. Additionally, any reemployment assistance benefits paid to employees terminated as provided by the bill may impact an employer's reemployment tax rate.

**C. Government Sector Impact:**

The bill requires the Attorney General to impose fines on an employer 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. Any revenue receipts from the imposition of such 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.

The bill authorizes the DOH to impose fines on an educational institution or a governmental entity that requires individuals to be vaccinated against COVID-19 as a condition of employment. Any revenue receipts from the imposition of such 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 DOH imposes such fines, the General Revenue Fund will experience an increase in revenue.

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 the \$5 million in nonrecurring funding from the Department of Legal Affairs Revolving 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.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends 1002.20, Florida Statutes.

This bill creates the following sections of the Florida Statutes: 112.0441, 381.00317, and 381.00319.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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