



Leading for Better Health

June 14, 2021

TO: Members of the House Labor and Industry Committee

FROM: Warren Kampf, Senior Vice President, Advocacy and External Affairs

SUBJECT: House Bill 262, Right to Refuse, including Amendment A01591

The Hospital and Healthsystem Association of Pennsylvania (HAP) opposes Amendment A01591 to House Bill 262, and also opposes the underlying bill.

This legislation is a direct challenge to the long-established duty of doctors and nurses to keep contagious diseases out of hospitals so the care of the sick can go on safely. People come to hospitals to be cured. Caregivers likewise seek to avoid becoming carriers of disease to and from the bedside. Interfering with these guiding principles could place lives at risk.

HB 262 would in effect prohibit hospitals from mandating vaccination or medical testing of employees. The bill, even with amendment A01591, will permit any employee to refuse, for example, a vaccination of any kind for "moral" reasons or because they were at some point previously infected with the illness. Such "reasons" will render any hospital mandate all but meaningless. If enacted, this bill will immediately run counter to the growing number of health care providers around the United States that have begun to mandate COVID-19 vaccination, and already mandate testing, for their caregivers. This bill will likewise overturn decades of hospital practices in our country which routinely mandate, for example, flu vaccination and testing of employees to avoid other contagious diseases from entering the hospital. Hospitals routinely mandate tuberculosis, hepatitis B, and of course COVID-19 tests.

Furthermore, the bill and the amendment also dictate a cumbersome set of procedures and protocols which will interfere with existing hospital rules already in place not only for COVID-19, but for other infection control practices and mandates. And hospitals around the commonwealth are likewise as we speak devising their own sets of protocols related to future infection control practices for COVID-19, including mandates on their caregivers; legislation like this will obviously interfere with that current, important, internal medical process.

The carve-out for a "minimally invasive visual examination" in the amendment will not encompass COVID-19 tests, given the definition of an "invasive medical test." This bill therefore now runs contrary to EEOC guidance that permits employers to require COVID-19 tests. ("...an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others.") Q and A, A.6, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

Just last week, OSHA released an Emergency Temporary Standard for Healthcare, <https://www.osha.gov/sites/default/files/covid-19-healthcare-ets-reg-text.pdf>. Contained within

this rule are provisions permitting employers to require COVID-19 testing as part of the screening process, with exceptions for accommodations limited to religious or medically-related disability reasons.

Language elsewhere in the bill and amendment stating an exception for tests or injections “specifically authorized by federal law” is likely insufficient to avoid a conflict with federal EEOC or OSHA guidance, and will at least result in litigation. Moreover, that hospitals and health systems will be barred from developing their own infection protocols absent a pre-existing government rule specifically stating they can do so will risk delay in implementing sound health care practices.

Finally, the permitted reasons to refuse the injection or test under the amendment are in almost every case broader than current federal and state law. First, there is no exception for an “undue hardship” as there currently is under both the Americans with Disabilities Act and Title VII with respect to accommodations for individuals with disabilities or holding sincerely held religious beliefs.

The permitted objection that the invasive medical test or injection is “detrimental to the health of the employee or prospective employee” is broader than the permitted exemption for individuals who are “disabled” under the Americans with Disabilities Act and state law.

The permitted objection on the basis of “a strong moral or ethical conviction similar to a religious belief” also could be interpreted to be broader than the permitted exemption under Title VII of a sincerely held religious belief. The EEOC’s guidance in this area provides that “[r]eligious beliefs include theistic beliefs as well as non-theistic moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>

The permitted objection related to an invasive medical test or injection not being approved by the FDA, or being approved after expedited development within fewer than three years, are new justifications altogether. This would also apply to COVID-19 tests.

The permitted objection on the basis that the employee was already infected with the disease fails to take into account any medical evidence as to whether the employee may still be susceptible to being infected by the disease or able to transmit it to others and, further, does not require a doctor’s certification that it is safe for the employee to remain in the workplace. Section 3(b)(2).

For all of the reasons stated above, The Hospital and Healthsystem Association of Pennsylvania respectfully requests that the members of the House Labor and Industry Committee vote No on the amendment A01591 and on the underlying bill, HB 262.