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HB 168: Texas COVID Vaccine Freedom Act Frequently Asked Questions

1. What does this bill do?
 - House Bill 168, the Texas COVID Vaccine Freedom Act, is the broadest, most comprehensive, and most legally defensible assertion of individual liberty with respect to medical decisions to date; protecting Texans against all COVID-19 vaccine mandates.
2. Why is this bill needed?
 - Many entities within Texas have or are attempting to require COVID-19 vaccinations of Texans against their will. Additionally, the Federal government, in a completely unprecedented announcement, has committed to mandating forced vaccination of private citizens, including Texans, against their will. States like Texas must resist this overreach to protect its sovereignty and the rights and liberties of its citizens.
3. What are the key provisions of the bill?
 - HB 168 has the effect of banning forced COVID-19 vaccinations, without being burdensome on businesses or healthcare providers, by confirming the rights of Texans to give informed consent before receiving this medical treatment, making it illegal to administer a COVID-19 vaccine without receiving informed consent, and empowering an individual with the ability to take legal action if forcibly vaccinated against their wishes by a vaccinator.
4. What is informed consent?
 - Informed consent is a bedrock principle of federal and state law in all 50 states. The concept of informed consent makes clear that Texans, and all Americans, have the right to be fully informed about a medical treatment, so that they may make the personal decision to decline or undergo the medical treatment. Medical ethics incorporates this concept and requires individuals to be aware of recommended treatments and be allowed to deny treatments.
5. Who will this bill protect?
 - This bill would protect rights and liberties of everyone who lawfully resides in the state of Texas from being forced to receive a COVID-19 vaccination against their will.
6. Will employees be able to be fired for not receiving a COVID-19 vaccination?
 - No. HB 168 protects the rights of Texans to decide what medical procedures they wish to undergo without the fear of being fired. Just like a business cannot currently fire a female for becoming pregnant, businesses would be unable to fire an employee for choosing to not receive a COVID-19 vaccination.
 - This bill should not change much of anything for businesses since it is historically almost without precedent for businesses to dictate medical treatments for their employees.

7. Will this bill increase frivolous lawsuits against business owners?
 - No. Businesses can still operate as they see fit. HB 168 simply clarifies that a business cannot punish an individual for not receiving a COVID-19 vaccine. It is historically almost without precedent for a business to require that their employees undergo a particular medical treatment or punish them for not receiving a medical treatment. HB 168 does nothing to change this norm.
8. Does this bill create a private right of action against businesses?
 - No. There is no private right of action against businesses. In situations like this, courts have consistently held that a private right of action cannot be inferred, but must be explicit. See *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).
9. Does this bill create additional burdens for healthcare providers or vaccinators?
 - No. Doctors and healthcare providers are already, in almost every instance, required to obtain informed consent before performing a medical procedure or administering a vaccine. HB 168 does not change these current and well-established practices nor add any new requirements.
10. Does this bill put healthcare workers at risk of frivolous lawsuits by individuals claiming that the signed informed consent form they provided to their healthcare provider is invalid because a third-party compelled or coerced them into getting the vaccine?
 - No. Subsection (d) represents existing law. Duress or coercion "is nothing more nor less than a 'trespass,' defined as 'an unlawful interference with one's person, property, or rights.'" *Shannon v. Law-Yone*, 950 S.W.2d 429, 434 (Tex. App. 1997). Courts have been dealing with precisely this issue for over a century and have found it quite workable.
 - In fact, one of the early cases involved vaccination where an individual disembarking a ship alleged that she had been compelled to be vaccinated against her wishes. The court held that by presenting her arm to the physician, she had consented. See *O'Brien v. Cunard Steamship Co.*, 154 Mass. 272 (1891).
11. If healthcare providers and vaccinators already get informed consent, why does the bill include a private cause of action?
 - In situations like this it is hard to prove damages, so the bill establishes a minimum by law.
 - The bill also clarifies and highlights to all Texans they have the right to provide informed consent.
 - In the event employers are able to evade or choose to ignore the prohibition on mandatory vaccinations, this is one additional way to protect Texans.
12. Does this bill prohibit employers from establishing workplace conditions or conditions of employment?
 - No. The bill simply requires that employees cannot be coerced into receiving a COVID-19 vaccination and cannot be punished for the failure to do so. It is historically almost without precedent for a business to require that their employees undergo a particular medical treatment. HB 168 does nothing to change this norm.
13. Does this force employers to choose to violate state or federal law?
 - No. The OSHA rule, as it has been summarized in the media, will give employees a choice between weekly testing and vaccination. Therefore, there is no "conflict preemption" between HB 168 and the OSHA rule because an employer can comply with both.

14. Isn't this also a "big government" action?

- No. HB 168 is a state government protecting the liberties of its citizens. HB 168 does not force an action or create a burden on anyone. The bill simply prohibits coercion of unwanted medical treatments.
- The United States Supreme Court has held that a state may provide "individual liberties more expansive than those conferred by the Federal Constitution."

15. Won't the federal government preempt this law?

- No. President Biden has made clear that the federal vaccine mandate will be done through an OSHA regulation. In *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88 (1992), the Supreme Court held that OSHA regulations would not preempt state laws of general applicability, e.g., those governing all the residents of a given state.
- Informed consent is a law of general applicability and therefore, would not likely be preempted by the federal regulations.

16. Does the bill protect government employees, government contractors, and private sector employees?

- This bill would protect employees who reside in the state of Texas, no matter who their employer is, from being forcibly vaccinated against their will in Texas.

17. Will this make Texas not a right-to-work state?

- No. Texas will remain a right-to-work state.
- Under current law in Texas, there are already many limitations on what employees can be fired for. For example, under the Texas Labor Code, an employer cannot fire a female for becoming pregnant, or anyone for retaliation or on the basis of race, religion, age or disability.

18. Does this expand exemptions to vaccination requirements?

- No. Subsection (b) represents existing law in all 50 states including Texas. The common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.

19. When would damages be recoverable and for how much?

- The bill contemplates that most plaintiffs will not be able to prove actual damages. HB 168 therefore creates a non-rebuttable presumption that damages will be at least \$5,000 if a person is vaccinated without informed consent. This is not uncommon. This is also likely to be extremely rare, as medical providers already receive informed consent prior to administration of vaccines.

20. What constitutes coercion?

- In the area of informed consent, a threat—such as "you will be fired unless you receive a vaccine"—would be coercion.

21. Does this bill create a new protected class?

- No. This bill merely codifies existing common law principles.