

BILL ANALYSIS

Senate Research Center
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C.S.S.B. 177
By: Middleton
Health & Human Services
4/11/2023
Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

S.B. 177 requires health care providers to obtain informed consent before administering an FDA-authorized COVID-19 vaccine. Informed consent is characterized by having full knowledge of the benefits and risks of a medical procedure. The bill prevents informed consent from being provided when a patient is facing compulsion or coercion from their health care provider.

The bill prevents adverse actions or penalties being imposed against individuals for refusing to receive a COVID-19 vaccination. This represents a critical protection for working Texans who fear retaliation for making a personal medical decision.

The bill empowers the attorney general to bring suit against individuals in violation of this bill. A court is authorized to issue an injunction and take steps to prevent repeat violations. Patients subjected to a violation will be entitled to damages up to \$5,000, including reasonable expenses and fees, from the health care provider.

The bill will not conflict with COVID-19 vaccine guidance for health care workers promulgated by the Center for Medicare & Medicaid Services. In addition, the bill affords workers the opportunity to pursue a religious and medical exemption if they are mandated by a health care facility to receive the COVID-19 vaccine.

Finally, S.B. 177 provides protections for health care workers providing good-faith medical guidance. The bill does not penalize a doctor's desire to recommend or advise a patient to receive the COVID-19 vaccine. In response to a suit filed under the bill, providers can assert an affirmative defense by demonstrating that a patient stated to the provider that they are providing informed consent before receiving a COVID-19 vaccine.

C.S.S.B. 177 amends current law relating to informed consent before provision of certain medical treatments and exemptions from COVID-19 vaccination requirements.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Requires that this Act be known as the Texas COVID-19 Vaccine Freedom Act.

SECTION 2. Provides that the legislature finds that:

- (1) this state is responsible for ensuring that individuals lawfully residing in this state have the right to provide or withhold consent for any medical treatment;
- (2) the decision in *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), establishing the concept of informed consent, has become a bedrock principle of the laws of this country and of each state;

(3) the American Medical Association's Code of Medical Ethics Opinion 2.1.1 recognizes the right of an individual to be fully informed of a recommended medical treatment to allow the individual to make an informed decision regarding the individual's course of treatment, including whether to obtain or decline a particular medical treatment;

(4) under 42 C.F.R. Section 482.13, a hospital is required as a condition of participation in Medicare to have in place a process for obtaining the informed consent of a patient before providing treatment to the patient and to ensure "[t]he patient or his or her representative (as allowed under State law) has the right to make informed decisions regarding his or her care";

(5) the United State Supreme Court upheld mandatory vaccination policies imposed by state and local governments to combat smallpox in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and acknowledged in *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980), that a state may provide "individual liberties more expansive than those conferred by the Federal Constitution";

(6) persons inside and outside this state have sought or are seeking to compel or coerce individuals lawfully residing in this state into being vaccinated against COVID-19 contrary to the individuals' preferences;

(7) any attempt to compel or coerce an individual lawfully residing in this state into being vaccinated against COVID-19 contrary to the individual's preference is inconsistent with the principles of informed consent;

(8) federal regulations requiring an individual who works or receives training in a health care facility, including a hospital, to obtain a COVID-19 vaccine provide an exemption from the vaccination requirement for individuals with a sincerely held religious belief, observance, or practice that is incompatible with the administration of the vaccine or a recognized medical condition for which vaccines are contraindicated; and

(9) Section 161.0086, Health and Safety Code, as added by this Act, prohibits any person from compelling or coercing an individual lawfully residing in this state into obtaining medical treatments involving the administration of a COVID-19 vaccine, except as otherwise provided by the final rule adopted by the Centers for Medicare and Medicaid Services and published at 86 Fed. Reg. 61555 (November 5, 2021).

SECTION 3. Amends Subchapter A, Chapter 161, Health and Safety Code, by adding Section 161.0086, as follows:

Sec. 161.0086. INFORMED CONSENT AND MEDICAL TREATMENT EXEMPTIONS FOR COVID-19 VACCINATION. (a) Defines "COVID-19," "health care facility," and "health care provider."

(b) Prohibits a person from compelling or coercing an individual lawfully residing in this state into obtaining a medical treatment involving the administration of a COVID-19 vaccine, including a COVID-19 vaccine approved or authorized by the United States Food and Drug Administration, contrary to the individual's vaccination preference.

(c) Prohibits a health care provider from providing to an individual lawfully residing in this state a medical treatment involving the administration of a COVID-19 vaccine, including a COVID-19 vaccine approved or authorized by the United States Food and Drug Administration, unless the provider obtains the individual's informed consent before administering the COVID-19 vaccine.

(d) Provides that, for purposes of this section:

(1) an individual lacks the capacity to provide informed consent for a medical treatment involving the administration of a COVID-19 vaccine if

the individual has been compelled or coerced into being vaccinated against COVID-19 contrary to the individual's vaccination preference; and

(2) a health care provider who advises or recommends the administration of a COVID-19 vaccine is not considered to have compelled or coerced an individual into obtaining a COVID-19 vaccine based solely on that advice or recommendation.

(e) Prohibits a person from taking an adverse action or imposing a penalty of any kind against an individual lawfully residing in this state for the individual's refusal or failure to obtain a medical treatment involving the administration of a COVID-19 vaccine.

(f) Provides that the prohibitions under Subsections (b), (c), and (e) apply only to the extent the prohibitions do not conflict with the final rule adopted by the Centers for Medicare and Medicaid Services and published at 86 Fed. Reg. 61555 (November 5, 2021).

(g) Provides that an individual employed by or providing services or receiving training in a health care facility that requires the individual to obtain a COVID-19 vaccination is exempt from the vaccination requirement if the individual requests orally or in writing an exemption in accordance with federal law based on:

(1) a sincerely held religious belief, observance, or practice that is incompatible with the administration of the vaccine; or

(2) a recognized medical condition for which vaccines are contraindicated.

(h) Authorizes the attorney general to bring an action for injunctive relief against a person to prevent the person from violating this section. Authorizes a court, in an injunction issued under this subsection, to include reasonable requirements to prevent further violations of this section.

(i) Provides that a health care provider who violates Subsection (c) is liable to the individual who is the subject of the violation for damages in an amount of not less than \$5,000. Authorizes the prevailing party in an action brought under this subsection to recover reasonable expenses incurred in bringing the action, including court costs, reasonable attorney's fees, investigation costs, witness fees, and deposition expenses.

(j) Authorizes a health care provider to assert an affirmative defense to an action brought under Subsection (i) that the individual or an individual legally authorized to consent on behalf of the individual stated to the provider before the COVID-19 vaccine was administered that the informed consent was voluntarily provided.

SECTION 4. Makes application of Section 161.0086, Health and Safety Code, as added by this Act, prospective.

SECTION 5. Severability clause.

SECTION 6. Effective date: upon passage or September 1, 2023.