

**From:** Senator Grant Burgoyne  
**Sent:** Wednesday, November 17, 2021 8:00 AM  
**To:** SenateStateAffairs  
**Cc:** Twyla Melton  
**Subject:** FW: H. 417, 412, 414, 429

*Grant*

Senator Grant Burgoyne

**From:** Kane, Brian <brian.kane@ag.idaho.gov>  
**Sent:** Wednesday, November 17, 2021 7:44 AM  
**To:** Senator Grant Burgoyne <gburgoyne@senate.idaho.gov>  
**Cc:** White, Kimi <Kimi.White@ag.idaho.gov>  
**Subject:** FW: H. 417, 412, 414, 429

Hi Senator Burgoyne—

This e-mail is in response to your recent inquiry regarding H. 417, H. 412, H. 414, and H. 429. Set forth below is a brief explanation of each bill along with a brief legal analysis. These pieces of legislation are generally legally permissible as within the discretion of the legislature, but they may create legal uncertainty, or alter the traditional legal relationships established by other laws. For example, traditionally within the employment context, the employer has the ability to establish workplace requirements that arise out of the employers determination of the necessities of the workplace. Certain pieces of legislation below appear to turn that relationship on its head because they allow an employee to refuse certain requirements of employment without any recourse from the employer. For example, within the context of a medical or religious accommodation, an employer has the ability to offer alternatives to an employee in order to accommodate a validly held religious or medical limitation on a workplace requirement. Legally, certain of these measures appear to place the employee in the position of telling the employer what he or she can and cannot do with regard to the employer's place of employment.

## **H. 417 Worker's Compensation for Vaccine-Related Accidents**

H. 417, if enacted, will make injuries arising from employer mandated vaccinations to be compensable under Idaho's Worker Compensation laws. Generally the Idaho Legislature has the authority to establish the parameters of workers compensation and its coverage. One question with regard to coverage may arise if the vaccination requirement is imposed by federal statute such as the OSHA ETS requiring vaccinations in all businesses with 100 or more employees. This requirement is required by the Federal Government, but implemented and overseen by the employer. This legislation is uncertain as to whether workers compensation coverage would be extended in such a situation. Another legal uncertainty is that under the legislation, all inferences are made in favor of a vaccination causing the injury to a worker, but these inferences may be legally difficult in application because it will most likely require medical expert testimony to establish causation. This could result in much more costly worker's compensation cases for employees, employers, and the government. Finally, this legislation could create compensable injuries due to circumstances beyond the control of the employer or the State of Idaho. The federal government has established requirements for vaccinations in several employment settings. These requirements are being challenged and parts of their implementation are either stayed or delayed. Although the ETS is currently stayed, it is also being actively litigated

and could ultimately be upheld. In such a scenario, the ETS would be considered the law of the land and Idaho businesses within its ambit required to comply.

This legislation also applies to all vaccinations, including those that may prevent occupational diseases. Hepatitis B is a common occupational disease for which there is a vaccine that is both available and routinely required for certain types of employment based on the likelihood of exposure. This legislation would discourage employers from requiring this vaccine, which in turn would make the worker's compensation system exposed to more claims for compensation for sufferers of this disease. It is worth noting that COVID-19 is not considered an occupational disease at this time, which means one could not claim worker's compensation for the claims arising from contraction of the virus, but one could make a claim due to adverse effects from the vaccine. Similarly, the addition of this provision is inconsistent with the existing definition of injury and accident under Idaho Code sec. 72-102(17).

## **H. 412: Adding Vaccine Discrimination as Actionable Under the Idaho Human Rights Commission**

H. 412 is legislation that would prohibit discrimination on the basis of vaccination status or a vaccination passport under certain circumstances. Most importantly provisions of this legislation could be preempted if (1) the executive order requiring vaccines for federal contractors is upheld; and/ or (2) the OSHA ETS vaccine requirement for employers with more than 100 employees is upheld. Similarly, CMS has issued a regulation requiring all healthcare workers in certain circumstances to be vaccinated. This regulation appears to be addressed by proposed Idaho Code sec. 67-5909B(2)(c), which creates an exemption from these requirements for licensed nursing homes, long-term care facilities, or assisted living facilities if subject to regulations issued by CMS. But this provision may create legal uncertainty and conflict with the other federal executive orders and regulations because if they are upheld the orders and regulations would likely preempt the application of this legislation in those circumstances. Practically speaking this could create a great deal of legal uncertainty because this legislation would be enforceable with regard to certain businesses, and preempted with regard to others.

## **H. 414: Right to Refuse Medical Treatment For Religious Beliefs**

H. 414 purports to create a right to claim a religious exemption from medical treatment that cannot be challenged by an employer, government, or other entity. Although identified as a religious exemption, the inability to question the sincerity of religious beliefs, converts this exemption into one of conscience in effect. This provision also allows an employer or government to include a waiver of liability for any refused medical treatment. This provision could also be subject to preemption as explained above. This legislation alters the legal landscape of the employer/ employee relationship, as well as the traditional system of an employer claiming an exemption and then the employer evaluating and accommodating such a claim.

The traditional framework for establishing a prima facie case of discrimination based on religious accommodation requires an employee to demonstrate that: (1) the employee has a bona fide religious belief, the practice of which conflicts with the requirements of employment; (2) the employer is informed of this belief and conflict; and (3) the employer nevertheless enforced its requirement against the employee. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993); *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984). To show undue hardship, an employer must demonstrate that an accommodation would require more than a de minimis cost. *Trans World Airlines v. Hardison*, 432 U.S. 63, 74 (1977). Relevant factors may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation. The employer needs to demonstrate how much cost or disruption a proposed accommodation would involve. See *Don T. v. U.S. Postal Serv.*, EEOC Appeal No. 2019001176 (Jan. 30, 2020); *Heidi B. v. U.S. Postal Serv.*, EEOC Appeal No. 0120182601 (Nov. 8, 2019).

This legislation inverts this framework because it no longer require that a religious belief be established or bona fide. It also removes from an employer the ability to accommodate such a belief in way that allows for the employer to remain

in charge of his or her workplace because the employer can no longer balance the needs of the workplace with reasonable accommodations of validly held religious beliefs. Finally, this legislation may place an employer within a federal/ state vise whereby the employer is required to comply with federal regulations requiring vaccinations while simultaneously being required to recognize religious exemptions that may not be correspondingly recognized within the federal regulatory environment. In this instance, the employer will be required to potentially subject himself to either federal sanction for non-compliance or state sanction for non-compliance. Care should be exercised to avoid placing an employer within the vise of a *Hobson's* choice.

## **H. 429: Opt Out of School Mask Mandates**

H. 429 would allow parents to opt themselves and their children out of mask mandates, as well as anyone over the age of 18. The language of this exemption is extremely broad. For example, the legislation permits one to “[...] exempt himself or the minor child from any requirement for the adult or child to wear a mask, use a plexiglass barrier, or observe other similar medical measures by submitting a signed statement...” H. 429, p. 2, ll. 29-35. Although the title of this provision is related to the spread of infectious diseases, proposed Idaho Code sec. 33-212(4-5) could be read as stand-alone provisions to apply more broadly than just the spread of infectious diseases. For example, this provision, if read as a stand-alone, could also be interpreted to apply to safety measures such as a catcher’s mask, a welding visor, or a football facemask as examples. It is recommended that this language be narrowed to more closely adhere to the drafter’s intent. Additionally, the opt-out would likely have the practical effect of negating any safety effects achieved by the use of masks. One additional consideration is that this measure would operate into an unknown and uncertain future—although the effects of COVID-19 are mostly known, the next virus, pathogen, or other airborne malady are unknown—this legislation if enacted could operate to preclude schools from taking appropriate steps to address future instances.

It is also worth noting that legally, H. 429 allows for an opt out for any reason—not just medical or religious reasons—but also for personal beliefs. Such an exemption should also include a waiver of liability by the person opting out. If a school imposes a safety measure that an individual opts out of, and then contracts a disease due to that opt out, it is recommended that the legal liability of the school be limited.

As noted above, these pieces of legislation are likely legally permissible, but as noted above will create a series of legal questions. Certain portions of the legislation may be preempted, certain provisions as indicated above may create legal uncertainty, and others may have unintended legal consequences.

I hope that you find the brief analysis above helpful.

Brian

