

**Testimony of Larry A. Weisberg, Esq.**  
**February 25, 2021**

Good morning, Chairman Cox and distinguished members of the House Labor and Industry Committee. Thank you for inviting me to participate in your panel discussion this morning. My name is Larry Weisberg, and I am an attorney and one of the founders of Weisberg Cummings, P.C., a law firm based in Harrisburg. For the past fourteen years, my law practice has focused primarily on representing employees who feel their rights have been discriminated against by their employers. I practice in both state and federal courts here in Pennsylvania, and my practice regularly involves filing cases with both the Pennsylvania Human Relations Commission and the Equal Employment Opportunity Commission. I also serve as a pro-bono mediator for the Equal Employment Opportunity Commission. While I speak entirely for myself today, I am currently Chair of the Pennsylvania Bar Association Labor and Employment Section, and I am an Adjunct Professor at Widener University Commonwealth Law School, teaching Employment Discrimination Law.

I had the opportunity to review House Bill 262, the Right to Refuse Act, and I also shared the bill with several other attorneys whose work is similar to mine, and I am happy to provide my observations, incorporating some thoughts from my colleagues. I am also happy to address any questions from the Committee members.

Generally, as I am sure you can imagine, since March 2020, employees have faced a host of new challenges related to the pandemic and the attendant disruptions in most peoples' daily employment routines. As an attorney whose firm represents employees, we have been similarly beset with new issues. We have done our best to

adapt existing laws to see what protections they may provide, as well as keep track of new laws, both state and federal, which provide some additional protections to workers. Some of those new protections, such as the federal Family First Coronavirus Response Act, which provided paid sick leave and enhanced family and medical leave, expired and have not been renewed.

As a general premise, employees have been afforded very few additional protections as they relate to an employee's COVID-19 related concerns. Under state law in Pennsylvania, employees who have concerns or limitations in returning to work may look to the Pennsylvania Human Relations Act<sup>1</sup> ("PHRA") to the extent accommodations may be needed due to a disability or a sincerely held religious belief. The PHRA does have limitations, however. As a threshold matter, only employers with four or more employees are covered by the PHRA.<sup>2</sup> Additionally, an employee requesting an accommodation due to a disability must still be able to perform the essential functions of his or her job with an accommodation, and the accommodation must not cause the employer an undue hardship.<sup>3</sup> Employees who present a direct threat to the safety of their coworkers do not need to be accommodated either,<sup>4</sup>

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<sup>1</sup> 43 Pa. Stat. Ann. § 955 (West). The Americans with Disabilities Act, 42 U.S.C.A. § 12112 (West) (disabilities) and Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2 (West) (religion), provide similar protections under Federal law. When interpreting the PHRA, "Pennsylvania courts ... generally interpret the PHRA in accord with its federal counterparts." *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 382 (3d Cir. 2002).

<sup>2</sup> 43 Pa. Stat. Ann. § 954 (West).

<sup>3</sup> 42 U.S.C.A. § 12112 (West).

<sup>4</sup> *Bender v. Norfolk S. Corp.*, 994 F. Supp. 2d 593 (M.D. Pa. 2014).

presenting challenges to employees who, for instance, cannot wear a mask or face shield due to a medical condition. With respect to an employee's sincerely held religious belief, those accommodation requests need only be met if the burden on the employer is *de minimis*.<sup>5</sup> As such, all of these protections are very case specific and limited in scope. At this point in time, there does not seem to be any protection for an employee who is simply concerned with returning to work due to the pandemic.

As written, House Bill 262 does provide additional protections to employees in Pennsylvania which do not currently exist across the board. While an employee may be able to refuse to get medically screened or vaccinated under certain limited circumstances and find protection under the PHRA, House Bill 262 does provide a much broader scope, in terms of both the number of employers covered, and the fact that the bill does not require the employee to provide any compelling reason not to get medically screened or vaccinated. The bill also has what I believe to be a robust enforcement mechanism compared to many similar laws which provide protections to employees. The statute of limitations is very generous, as is the imposition of treble damages and attorney fees and costs.<sup>6</sup> As an advocate and counsel for employees, I believe this bill provides solid recourse to aggrieved employees.

I do note, as a counterbalance and policy consideration, that I also have many individuals contact my firm who are concerned with returning to work at employers'

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<sup>5</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S. Ct. 2264, 2277, 53 L. Ed. 2d 113 (1977).

<sup>6</sup> I note that it is not entirely clear what is meant by "other legal and equitable relief" as indicated in Section 5. (4). For instance, it is unclear if compensatory and/or punitive damages are available. It is also unclear whether there is a right to a jury trial.

facilities where, at least in the employee's opinion, the employer has not taken proper steps to protect employees from contracting COVID-19. This could involve a disregard for face masks, social distancing, proper screening, or any number of other concerns. Some employees are concerned with returning to an employer's facility even when proper precautions are taken because they, or a close relative, are considered high risk. As previously discussed, these employees have little protection as we sit here today. I do worry that the passage of House Bill 262 will put those employees in an even more precarious position if they are forced to return to work with co-workers who have not been medically screened and/or vaccinated. Although the intent of House Bill 262 is clear in its attempt to support employees who make the very personal decision to not get medically screened and/or vaccinated, perhaps complementary provisions should be considered to protect those who are at risk or have legitimate concerns in returning to work alongside the beneficiaries of House Bill 262's protections.

Thank you again for inviting me, and I would be happy to address any questions of the Committee members.