

Notice of Emergency Rule

DEPARTMENT OF LEGAL AFFAIRS

RULE NO.: RULE TITLE:

2ER21-1 Private Employer Vaccination Mandate Complaints

SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE: Pursuant to section 381.00317(6), Florida Statutes, the Department is not required to make findings of an immediate danger to the public, health, safety, or welfare as all conditions are deemed met to adopt emergency rules pursuant to section 120.54(4), Florida Statutes.

REASON FOR CONCLUDING THAT THE PROCEDURE IS FAIR UNDER THE CIRCUMSTANCES: Pursuant to section 381.00317(6), Florida Statutes, the procedures are deemed fair under the circumstances.

SUMMARY: The rule establishes the procedure for private employer vaccination mandate complaints pursuant to 381.00317(3) and (4), Florida Statutes.

THE PERSON TO BE CONTACTED REGARDING THE EMERGENCY RULE IS: Edward Tellechea, Chief Assistant Attorney General, PL-01 The Capitol, Tallahassee, Florida 32399-1050, by email at Ed.Tellechea@myfloridalegal.com; or Lynette Norr, Senior Attorney General, PL-01 The Capitol, Tallahassee, Florida 32399-1050, by email at Lynette.Norr@myfloridalegal.com.

THE FULL TEXT OF THE EMERGENCY RULE IS:

2ER21-1 Private Employer Vaccination Mandate Complaints.

(1) Definitions – As used in this rule and Section 381.00317, F.S.:

(a) The “department” means the Department of Legal Affairs.

(b) “Employee” means any person who receives remuneration from a private employer for the performance of any work or service occurring within this state while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral, or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors. The definition of “employee” does not include someone who is an independent contractor, a volunteer, or someone who serves in a private nonprofit agency without compensation other than expenses.

(c) The term “independent contractor” as used in subsection (1)(b) of this rule means any person within this state who either:

1. meets four or more of the following:

a. maintains a separate business with his or her own work facility, truck, equipment, materials, or similar accommodations apart from the private employer;

b. holds or has applied for a federal employer identification number;

c. receives compensation for services rendered or work performed and such compensation is paid to a business, other than the private employer, rather than to an individual;

d. holds one or more bank accounts in the name of a business entity, other than the private employer for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation;

e. performs work or is able to perform work for any entity in addition to or besides the private employer at his or her own election without the necessity of completing an employment application or process; or

f. receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement, unless such contractual agreement expressly states that an employment relationship exists; or

2. based on the nature of the situation satisfies any of the following conditions:

a. The person performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work;

b. The person incurs the principal expenses related to the service or work that he or she performs or agrees to perform;

c. The person is responsible for the satisfactory completion of the work or services that he or she performs or agrees to perform;

d. The person receives compensation for work or services performed for a commission or on a per-job basis and not on any other basis;

e. The person may realize a profit or suffer a loss in connection with performing work or services;

f. The person has continuing or recurring business liabilities or obligations;

g. The success or failure of the person's business depends on the relationship of business receipts to expenditures.

(d) "Private employer" means any person, sole proprietorship, partnership, limited partnership, limited liability partnership, limited liability company, corporation, or any similar legal entity who employs employees within this state. The definition of "private employer" includes the legal representative of a deceased person, the receiver or trustees of any person or business entity, employment agencies, employee leasing companies, and similar agents who provide employees to other persons. The definition of "private employer" does not include the United States, its agencies, the state or any political subdivision thereof, including the executive, legislative, and judicial branches of government, the independent establishments of the state, counties, municipalities, districts, authorities, boards, or commissions, any agencies that are subject to chapter 286 of the Florida Statutes, educational institution as defined in Florida Statutes §112.0441, or a corporation or legal entity created by act of the legislature or ordinance by a governmental entity.

(e) "Functional equivalent of termination" as used in Section 381.00317(4), F.S., shall be found when it is determined that (i) the employee resigned under duress; or (ii) the employer, through its actions, made working conditions so difficult or intolerable that a reasonable person in the employee's position would feel compelled to resign.

(2) The department shall investigate a legally sufficient complaint alleging a violation of Section 381.00317, F.S., or any rule adopted thereunder. The complaint must be submitted on form VAX 1, titled "Private Employer Vaccination Mandate Complaint," (12/21), which is hereby incorporated by reference and available at <http://myfloridalegal.com/vaxmandate/webform>. A complete complaint may be submitted either electronically at <http://myfloridalegal.com/vaxmandate/webform>, a paper hard copy of the complaint form may be obtained at <http://myfloridalegal.com/vaxmandate/paper> and submitted via email to: vaxmandate@myfloridalegal.com, or a paper hard copy may be mailed to: The Department of Legal Affairs, Private Employer Vaccine Mandate Program, PL-01, The Capitol, Tallahassee, Florida 32399-1050.

(3) Complainants who submit an incomplete complaint shall be notified in writing and will have thirty (30) days from the date of the notice of incompleteness to submit to the Department the missing information or materials. Failure to timely provide the requested missing information or materials shall result in dismissal of the complaint.

(4) A complaint is legally sufficient if it contains all the information required by the complaint form and ultimate facts that demonstrate that a violation of Section 381.00317, F.S., or any rule adopted thereunder, has occurred. In order to determine legal sufficiency, the department may require supporting information or documentation. When an investigation of any subject is undertaken, the department shall promptly furnish to the subject a copy of the complaint that resulted in the initiation of the investigation. The subject may submit a written response to the information contained in such complaint or document within twenty (20) days after service to the subject of the complaint or document. The subject's written response shall be considered by the department when determining if there is probable cause.

(5) When its investigation is complete and legally sufficient, the department shall prepare and submit to the Attorney General's designee the department's investigative report. The report shall contain the investigative findings and the recommendations of the department concerning the existence of probable cause. Upon review of the investigative findings and recommendations, the designee shall either find that there is probable cause that one or more violations of Section 381.00317, F.S., or any rule adopted thereunder, has occurred or that there is insufficient evidence to support a finding of probable cause and that the complaint should be dismissed. If probable cause is found, the department shall file a formal administrative complaint against the subject that complies with Rule 28-106.2015, F.A.C., and prosecute that complaint pursuant to Chapter 120, F.S., and Rule Chapter 28-106, F.A.C.

(6) An evidentiary hearing before an administrative law judge from the Division of Administrative Hearings shall be held pursuant to Section 120.57(1), F.S., if there are any disputed issues of material fact. The department

shall have the burden to prove the allegations contained in the complaint by a preponderance of evidence. The administrative law judge shall issue a recommended order pursuant to Section 120.57(1), F.S., and the department shall determine and issue the final order in each case which shall constitute final agency action. The penalty set forth in the final order shall be imposed in accordance with Section 381.00317(4)(a) and (b), F.S.

(7) The department may resolve a complaint pursuant to Section 120.57(4), F.S., and impose a penalty through informal disposition by consent order.

(8) The department shall periodically notify the person who filed the complaint of the status of the investigation, indicating whether probable cause has been found and the status of the administrative proceeding or appeal. When probable cause has been found, the department shall provide to the person who filed the complaint a copy of the administrative complaint and:

(a) A written explanation of how an administrative complaint is resolved by the adjudicative process.

(b) A written explanation of how and when the person may participate in the adjudicative process.

(c) A written notice of any hearing before the Division of Administrative Hearings.

(9) When probable cause is not found, the department shall so inform the person who filed the complaint and notify that person that he or she may, within 30 days, provide any additional information to the department which may be relevant to the decision. To facilitate the provision of additional information, the person who filed the complaint may receive, upon request, a copy of the investigative report that supported the recommendation for closure. In any administrative proceeding under Section 120.57(1), F.S., the person who filed the complaint shall have the right to present oral or written communication relating to the alleged violations or to the appropriate penalty.

Rulemaking Authority 381.00317(6) FS. Law Implemented 381.00317(3), (4), (5) FS. History--New

THIS RULE TAKES EFFECT UPON BEING FILED WITH THE DEPARTMENT OF STATE UNLESS A LATER TIME AND DATE IS SPECIFIED IN THE RULE.

EFFECTIVE DATE: December 2, 2021