

## **Mandating Influenza Vaccinations for Healthcare Workers State by State**

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### **I. Introduction**

Despite the continuous recommendations provided by various healthcare organizations and federal agencies, the number of workers in the healthcare sector who received the influenza vaccination during the last flu season remained low.<sup>1</sup> While inoculation is an important step towards preventing the passage of communicable diseases through the entire population, it is particularly important for healthcare workers.<sup>2</sup> A mandatory influenza vaccination program for healthcare workers could minimize the risk of transmission and diminish the negative misconceptions about the influenza vaccine overall. Due to the diversity among healthcare workers and their workplaces, it can be difficult to monitor exposure to infectious and communicable diseases.<sup>3</sup>

### **II. Recommendations by Multiple Agencies**

Several agencies have voiced their concerns regarding the failure of a large segment of healthcare workers to obtain regular vaccinations. The Centers for Disease Control and Prevention (“CDC”), the Advisory Committee on Immunization Practices (“ACIP”), and the Healthcare Infection Control Practices Advisory Committee (“HICPAC”) have all recommended that American healthcare workers get annual vaccinations for the influenza virus.<sup>4</sup>

The CDC is an independent federal agency that manages and supports activities related to

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<sup>1</sup> *Vaccination: A Key Weapon in the Occupational Health Arsenal*, INFECTION CONTROL TODAY, (Oct. 31, 2018), <https://www.infectioncontroltoday.com/occupational-health/vaccination-key-weapon-occupational-health-arsenal>.

<sup>2</sup> Linda R. Greene, *Influenza Vaccination of Health Care Workers: A Patient Safety Imperative*, OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION, (Aug. 30, 2017), <https://health.gov/news/blog/2017/08/influenza-vaccination-of-health-care-workers-a-patient-safety-imperative/>.

<sup>3</sup> *Healthcare, Infectious Diseases*, U.S. DEPART. OF LABOR, [https://www.osha.gov/SLTC/healthcarefacilities/infectious\\_diseases.html](https://www.osha.gov/SLTC/healthcarefacilities/infectious_diseases.html) (last visited April 30, 2019).

<sup>4</sup> *Influenza Vaccination Information for Health Care Workers*, CTRS. FOR DISEASE CONTROL & PREVENTION, (Nov. 16, 2018), <https://www.cdc.gov/flu/professionals/healthcareworkers.htm>.

health promotion and disease prevention and preparedness in the United States for the benefit of public health.<sup>5</sup> The CDC collaborated with the RAND Corporation<sup>6</sup> to prepare an internet panel survey that commenced in April 2011.<sup>7</sup> The survey's data demonstrated that in settings where vaccination requirements were in place, vaccination coverage was increased among the populace.<sup>8</sup> When healthcare employees were neither required nor recommended to receive flu vaccinations, coverage did not exceed 43.4%.<sup>9</sup>

The ACIP, a committee comprised of medical and public health experts, makes recommendations to the Director of the CDC concerning the use of vaccines.<sup>10</sup> The ACIP recommends that all healthcare workers and individuals training for healthcare professions receive annual vaccinations for the influenza virus.<sup>11</sup> Because of the regular contact with patients and infective equipment within hospitals, ACIP suggests healthcare workers can develop a higher risk of becoming both recipients and transmitters of vaccine-preventable diseases.<sup>12</sup>

HICPAC is another independent federal advisory committee that provides advice and guidance to the Department of Health and Human Services ("HHS"), as well as the CDC, concerning the practice of infection control and plans for surveillance, prevention, and control of healthcare-associated infections, antimicrobial resistance and further related events in healthcare

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<sup>5</sup> *Mission, Role, and Pledge*, CTRS. FOR DISEASE CONTROL & PREVENTION, (Apr. 14, 2014), <https://www.cdc.gov/about/organization/mission.htm>.

<sup>6</sup> *About the RAND Corporation*, RAND CORPORATION, <https://www.rand.org/about.html> (last visited Nov. 29, 2018) (defining the RAND Corporation as "a research organization that develops solutions to public policy challenges to help make communities throughout the world safer and more secure, healthier, and more prosperous.").

<sup>7</sup> *Press Briefing Transcript: CDC Telebriefing on Influenza Vaccination*, CTRS. FOR DISEASE CONTROL & PREVENTION, (Aug. 18, 2011), [https://www.cdc.gov/media/releases/2011/t0818\\_influenza\\_vaccination.html](https://www.cdc.gov/media/releases/2011/t0818_influenza_vaccination.html).

<sup>8</sup> *Press Briefing Transcript*, *supra* note 6.

<sup>9</sup> *Press Briefing Transcript*, *supra* note 6.

<sup>10</sup> *Committee Information*, CTRS. FOR DISEASE CONTROL & PREVENTION, (Oct. 23, 2018), <https://www.cdc.gov/vaccines/acip/committee/index.html>.

<sup>11</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *IMMUNIZATION OF HEALTH-CARE PERSONNEL: RECOMMENDATIONS OF THE ADVISORY COMMITTEE ON IMMUNIZATION PRACTICES (ACIP)* (2011).

<sup>12</sup> *Immunization of Health-Care Personnel*, *supra* note 10.

settings.<sup>13</sup> This committee has advocated for facilities and organizations providing direct patient care to establish a comprehensive vaccination policy for all healthcare workers.<sup>14</sup>

### III. Current State Policies Concerning Influenza Vaccinations

Laws concerning vaccinations among healthcare workers significantly differ by state in terms of the vaccines, healthcare settings, and covered individuals under the individual laws.<sup>15</sup> More than half of the states have laws pertaining to vaccinations for healthcare workers in traditional healthcare settings such as hospitals and ambulatory care facilities.<sup>16</sup> Eighteen states have established regulations concerning flu vaccinations for hospital healthcare workers specifically, which also include vaccination exemptions.<sup>17</sup> Exemptions to influenza vaccination requirements may be based on medical reasons, religious beliefs, or philosophical purposes.<sup>18</sup>

In California, a law provides, “[e]ach general acute care hospital shall require its employees to be vaccinated, or if the employee elects not to be vaccinated, to declare in writing that he or she has declined the vaccination.”<sup>19</sup> Although this policy implies that healthcare personnel should receive vaccinations, exemptions for philosophical purposes can apply.<sup>20</sup> In Colorado, licensed hospitals are required to ensure that healthcare workers who are not immunized wear a surgical or procedural mask during influenza season when in direct contact with patients.<sup>21</sup> In New York State, when the influenza season commences, all healthcare and residential facility personnel must: (1)

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<sup>13</sup> *Healthcare Infection Control Practices Advisory Committee (HICPAC)*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 13, 2018), <https://www.cdc.gov/hicpac/index.html>.

<sup>14</sup> *Id.*

<sup>15</sup> Megan C. Lindley, et al., *Assessing State Immunization Requirements for Healthcare Workers and Patients*, 32(6) AM. J. PREVENTIVE MED. 459, 463 (2007).

<sup>16</sup> *Id.*

<sup>17</sup> *Menu of State Hospital Influenza Vaccination Laws*, CTRS. FOR DISEASE CONTROL & PREVENT: PUBLIC HEALTH LAW, 1, (Oct. 2017).

<sup>18</sup> *Id.* at 3.

<sup>19</sup> CAL. HEALTH & SAFETY CODE § 1288.7(a) (West 2019).

<sup>20</sup> *Menu of State Hospital Influenza Vaccination Laws*, *supra* note 16, at 7.

<sup>21</sup> COLO. CODE REGS. § 1011-1-II-10.8(b) (2019).

document the flu vaccination status of all healthcare workers; (2) provide surgical or procedural masks for unvaccinated workers; and (3) ensure that masks are worn when in contact with patients or residents so long as the influenza virus is present.<sup>22</sup> Thus, when the influenza virus is active, healthcare workers in New York are required to provide documentation of their vaccination status and wear masks to ensure communicable diseases are not spread further.

Currently, New Jersey has no laws requiring that healthcare workers receive the influenza vaccination. Recently, however, a bill has been proposed that would require certain healthcare facilities to offer, and healthcare workers to receive, annual influenza vaccinations.<sup>23</sup> Unlike other policies, this bill does not explicitly provide that any specific exemptions apply.

#### IV. Legal Foundations

##### a. Constitutional Provisions

Under the United States Constitution, states have the power to promote the public's welfare.<sup>24</sup> Specifically, this responsibility includes the ability to restrict individual activities that threaten an individual's freedom.<sup>25</sup> States can utilize the police powers granted to them by the Constitution to promote the public good by enacting and enforcing public safety and health regulations pertaining to influenza vaccinations.

##### b. State Powers

The United States Supreme Court case *Jacobson v. Massachusetts*<sup>26</sup> was one of the first decisions by the Court to demonstrate how the threat of communicable diseases may take

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<sup>22</sup> *Influenza Prevention and Control*, 2017-2018, 36(5) THE NEW YORK DEPT. OF HEALTH AND MENTAL HYGIENE 33-42, (2017).

<sup>23</sup> A.1576, 218th Leg., (N.J. 2018).

<sup>24</sup> Abigale L. Ottenberg, MA, et al., *Vaccinating Health Care Workers Against Influenza: The Ethical and Legal Rationale for a Mandate*, 101(2) AM J. PUB. HEALTH 212, 213 (2011).

<sup>25</sup> *Id.*

<sup>26</sup> 25 S. Ct. 358 (1905).

precedence over an individual's liberty interest in refusing treatment. In *Jacobson*, the Court examined a particular Massachusetts law which provided that,

the board of health of a city or town, if in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars.<sup>27</sup>

Justice Harlan, writing on behalf of the Court, stated that the Constitution granted the State of Massachusetts the authority to approve this statute under the police power.<sup>28</sup> The case of *Jacobson* asserts two possible interests or goals that might further a state's interest in having its citizens vaccinated.<sup>29</sup> First, a state may seek to protect others from external dangers, such as transmittable diseases.<sup>30</sup> Specifically, having a larger population immune from a communicable or contagious disease will reduce the chances of an epidemic spreading to people who are susceptible.<sup>31</sup> Second, a state might also have an interest in protecting or furthering public health and safety.<sup>32</sup>

**c. Title VII of the Civil Rights Act and the EEOC**

Employers with at least 15 employees who seek to implement a mandatory influenza vaccination should ensure that they are in compliance with reasonable accommodation requirement provided by Title VII of the Civil Rights Act<sup>33,34</sup> Title VII prohibits employers from

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<sup>27</sup> *Id.* at 360.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 362.

<sup>30</sup> WENDY K. MARINER & GEORGE J. ANNAS, PUBLIC HEALTH LAW 57 (2nd ed. 2014) (citing *Gibbons v. Ogden*, 22 U.S. 1, 78 (1824)).

<sup>31</sup> *Id.* at 79.

<sup>32</sup> *Id.*

<sup>33</sup> Title VII of the Civil Rights Act of 1962, 42 U.S.C. §§ 2000e-2, 2000e-3 (1970 ed. and Supp. IV).

<sup>34</sup> *Small Business Requirements*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employers/smallbusiness/requirements.cfm> (last visited Dec. 3, 2018).

terminating employees or discriminating against individuals because of the individual's religion.<sup>35</sup> Religion encompasses all aspects of religious practice including belief, unless the employer is incapable of reasonably accommodating the employee's religious observation due to an undue hardship on the employer's business.<sup>36</sup> Employees are required to demonstrate that they have a sincere religious belief that conflicts with their duties at their place of employment.<sup>37</sup>

Among the many issues faced by employers, whether an employee's anti-vaccination beliefs qualify as a religious exemption is particularly important.<sup>38</sup> The Third Circuit in *Fallon v. Mercy Catholic Med. Ctr.* held that a former medical center employee who was discharged for refusing to be vaccinated against the flu did not satisfy a religious discrimination claim under Title VII because his refusal was not religious.<sup>39</sup> Specifically, the court held that Fallon's belief that "[T]he flu vaccine may do more harm than good" was a medical belief, not a religious one that Title VII recognizes.<sup>40</sup>

The EEOC is an independent federal agency created by Title VII of the Civil Rights Act, with the responsibility of interpreting and enforcing federal laws that prohibit discrimination.<sup>41</sup> The EEOC recommends encouraging employees to get their inoculations rather than mandating the vaccination.<sup>42</sup>

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<sup>35</sup> *Fallon v. Mercy Catholic Med. Ctr.*, 877 F.3d 487, 490 (3d Cir. 2017).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Nathaniel M. Glasser & Katie Smith, A Shot in the Arm for Employer Vaccine Requirements for Health Care Workers*, EPSTEIN BECKER & GREEN P.C.: HEALTH EMPLOYMENT AND LABOR, (Jan. 29, 2018), <https://www.healthemploymentandlabor.com/2018/01/29/a-shot-in-the-arm-for-employer-vaccine-requirements-for-health-care-workers/>.

<sup>39</sup> *See Fallon* at 492.

<sup>40</sup> *Id.*

<sup>41</sup> *Equal Employment Opportunity*, U.S. DEPT. OF LABOR, <https://www.dol.gov/general/topic/discrimination> (last visited Nov. 20, 2018).

<sup>42</sup> *Katherin M. Flett, The EEOC Catches the Flu: A Cautionary Tale for Employers with Mandatory Flu Vaccination Programs*, DANNA MCKITRICK, P.C. ATTORNEYS AT LAW (Mar. 1, 2018, 1:58pm), <http://beyondthefineprint.com/2018/03/the-eeoc-catches-the-flu-a-cautionary-tale-for-employers-with-mandatory-flu-vaccination-programs/>.

**d. The Americans with Disabilities Act**

An employer seeking to mandate the influenza vaccination may also face difficulties under the Americans with Disabilities Act (“ADA”).<sup>43</sup> The purpose of the ADA is to ensure that individuals with disabilities hold the same rights and opportunities as others in the community.<sup>44</sup> The ADA makes it unlawful for a “covered entity” to “discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>45</sup> A “covered entity” is defined as “an employer, employment agency, labor organization, or joint labor-management committee.”<sup>46</sup> The ADA defines an “employer” as:

a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person<sup>47</sup>

Under the ADA, employers must provide reasonable accommodations to qualified applicants or employees with disabilities.<sup>48</sup> A reasonable accommodation may be required for an employee upon evidence of the disability and need unless an employer demonstrates that the accommodation will cause an undue hardship.<sup>49</sup> An exemption for a vaccination may be sought as a reasonable accommodation on the basis of disability under the ADA.<sup>50</sup>

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<sup>43</sup> Americans with Disabilities Act, 42 U.S.C. §§ 12101 et. seq. (2012).

<sup>44</sup> 42 U.S.C. § 12101(b)(1)-(3).

<sup>45</sup> 42 U.S.C. § 12112(a).

<sup>46</sup> 42 U.S.C. § 12111(2).

<sup>47</sup> 42 U.S.C. § 12111(5)(a).

<sup>48</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>49</sup> *Id.*

<sup>50</sup> *Pandemic Preparedness in the Workplace and The Americans with Disabilities Act*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Oct. 9, 2009), [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html).

Due to the high surge of vaccination requirements and modified vaccination policies, a few employers have been faced with legal challenges on the basis of disability.<sup>51</sup> One particular case included an employee from Mount Nittany Medical Center (“MNMC”) who believed she was wrongfully terminated after refusing the new mandatory vaccination requirements required by the hospital.<sup>52</sup> On appeal, the Third Circuit Court of Appeals found that MNMC had, in fact, been on notice of the employee’s disability and her wish for a reasonable accommodation.<sup>53</sup> Ultimately, her good faith request for an alternative accommodation, (i.e., exemption from the vaccine requirement) was a protected activity under the ADA, and was sufficient to maintain a retaliation claim.<sup>54</sup> The Eighth Circuit Court of Appeals had a different response than the Third Circuit Court of Appeals in a similar scenario. In *Hustvet v. Allina Health Sys.*, the Eighth Circuit determined that a former employee of Allina Health System failed to prove her disability of “chemical sensitivities and allergies derive from an immune system disability and she suffers from a seizure disorder” through evidence when she claimed exemption from a rubella immunization as a reasonable accommodation on the basis of her disability.<sup>55</sup> These cases from the Third and Eighth Circuit Courts of Appeals demonstrate the diversity of results under ADA for vaccination exemptions that is likely to only continue to grow.<sup>56</sup>

#### **f. The Occupational Safety and Health Administration**

Under the Occupational Safety and Health Act (“OSHA”)<sup>57</sup>, healthcare employers may be

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<sup>51</sup> Leila Barraza, et al., *The Latest in Vaccine Policies: Selected Issues in School Vaccinations, Healthcare Worker Vaccinations, and Pharmacist Vaccination Authority Laws*, 45(1 Suppl), J LAW MED ETHICS 16-19, (Mar. 2017).

<sup>52</sup> See *Ruggiero v. Mount Nittany Med. Ctr.*, 736 Fed. Appx. 35, 37-38 (3d Cir. 2018).

<sup>53</sup> *Id.* at 38.

<sup>54</sup> *Id.*

<sup>55</sup> See *Hustvet v. Allina Health Sys.*, 910 F.3d 399, 411 (8<sup>th</sup> Cir. 2018).

<sup>56</sup> Daniel B. Pasternak & Melissa Legault, *Healthcare Worker’s Vaccine Refusal Not Immunized by Americans with Disabilities Act (US)*, THE NATIONAL LAW REVIEW (Dec. 14, 2018), <https://www.natlawreview.com/article/healthcare-worker-s-vaccine-refusal-not-immunized-americans-disabilities-act-us>.

<sup>57</sup> Occupational Safety and Health Act, 29 U.S.C. §651 et seq. (1970).

able to require their healthcare personnel to submit to an influenza vaccination. OSHA imposes an obligation on employers to ensure that the workplace is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to their employees,” also known as the general duty clause.<sup>58</sup> When individuals employed in the health field have the responsibility of working with patients who may have the flu, they are at a greater risk of exposure to the influenza virus and require additional safeguards for protection from workplace infection.<sup>59</sup>

Under OSHA’s guidelines, healthcare workers who perform tasks in areas where highly transmissible diseases are prevalent should be provided additional precautions to protect them from workplace hazards.<sup>60</sup> One of OSHA’s recommendations provides that healthcare employers should be “promoting, administering and making readily accessible the annual flu vaccine to all workers.”<sup>61</sup> Making healthcare and emergency medical services personnel a “priority group for receiving the flu vaccine” would be an integral step in reducing the transmission of the virus.<sup>62</sup>

## **V. Societal Compliance and Resistance**

### **a. Supporting a Mandatory Influenza Vaccination Policy**

When determining the effectiveness of a state mandatory influenza vaccination policy, it is also vital to look at it from the healthcare workers’ perspective. Healthcare workers who are not utilizing the proper safeguards against the influenza virus are not only endangering themselves, but also their patients, colleagues, and families as well. Many healthcare organizations have found

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<sup>58</sup> See *Safeway, Inc. v. OSHRC*, 382 F.3d 1189, 1194 (10th Cir. 2004); 29 U.S.C. § 654(a)(1) (defining the general duty clause as “(a) Each employer (1) shall furnish to each of his employee’s employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this chapter.”).

<sup>59</sup> *Seasonal Flu: Employer Guidance Reducing Healthcare Workers’ Exposures to Seasonal Flu Virus*, U.S. DEPT. OF LABOR, <https://www.osha.gov/dts/guidance/flu/healthcare.html> (last visited Dec. 3, 2018).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

it beneficial to conduct an in-depth cost-benefit analysis concerning the influenza virus. A vast number of healthcare workers believe the benefits outweigh the risks when it comes to influenza vaccinations and have provided two primary reasons in support of getting vaccinated including: (1) desire to protect patients and (2) self-protection.<sup>63</sup>

**b. Resistance to a Mandatory Influenza Vaccination Policy**

Personnel in the healthcare field opposed to mandatory influenza vaccinations have voiced concerns due to finances,<sup>64</sup> negative attitudes toward vaccines,<sup>65</sup> and protecting decisional autonomy.<sup>66</sup> The cost-benefit analysis is the most prevalent here as financial considerations play a vital role in the overall design and implementation of immunization programs. The cost of vaccination can be viewed from two different perspectives. On the one side, by not offering vaccinations on worksite premises, there could be financial ramifications for employees who need to pay for the vaccination out-of-pocket or take time off to get their vaccinations.<sup>67</sup> On the other hand, failure to properly protect workers and patients from an outbreak of influenza has financial consequences for healthcare organizations.<sup>68</sup> However, an increase in vaccinations in the healthcare field could result in a reduction in the number of sick days and increased productivity as “presenteeism,” which is employees coming to work while being sick, lessens.<sup>69</sup>

The media has also played a significant role in persuading individuals to favor one stance over another. An example of this can be seen in the print context through *Time Magazine*'s article,

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<sup>63</sup> Theo Lorenc, et al., *Seasonal influenza vaccination of healthcare workers: systematic review of qualitative evidence*, 17(372) BMC HEALTH SERV RES. 1 (2017).

<sup>64</sup> *Immunizing Healthcare Personnel Against Influenza: A Report on Best Practices*, NATIONAL FOUNDATION FOR INFECTIOUS DISEASES, 4–5, (2007).

<sup>65</sup> *Id.*

<sup>66</sup> Anina Pless, et al., *Reasons why nurses decline influenza vaccination: a qualitative study*, 16(20) BMC NURS 1–7, (Apr. 28, 2017).

<sup>67</sup> *Immunizing Healthcare Personnel Against Influenza*, *supra* note 46.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

*How Effective is the 2018 Flu Shot? What You Should Know.*<sup>70</sup> In the article, the author discusses the 17 percent of effectiveness against the viral strain, known as H3N2, in Canada.<sup>71</sup> However, in early February of this year, the CDC reported that the influenza vaccine was 25% effective against the H3N2 strain, and still recommended healthcare providers receive influenza vaccination.<sup>72</sup> This misleading information provided through a print medium is only one instance in which an individual's views could be substantially impaired by inaccuracies portrayed by the media.

Finally, for some nurses, the importance of “protecting decisional autonomy” in order to take care of themselves and their patients was of more value than receiving the vaccination.<sup>73</sup> Among other reasons for advocating for personal autonomy, there were three principle justifications: (1) the right to bodily integrity; (2) the right to fall ill; and (3) the right not to be pressured into doing something by their superiors.<sup>74</sup>

## **VI. Are Voluntary Programs Sufficient?**

Healthcare facilities in the United States have attempted to increase awareness, while simultaneously protecting healthcare workers and patients, through voluntary vaccination programs. Though some may prove successful, many employees, when faced with the decision, decline. One study indicated that more than half of unvaccinated healthcare workers stated they would have received the influenza vaccination had their employer required it.<sup>75</sup> Facilities across

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<sup>70</sup> Jason Gale, *How effective is the 2018 Flu Shot? What You Should Know*, TIME MAGAZINE (Feb. 7, 2018), <http://time.com/5138100/how-effective-is-the-2018-flu-shot/>.

<sup>71</sup> *Id.*

<sup>72</sup> Madeline Morr, *CDC: Influenza Vaccine 25% effective against H3N2 in 2017-2018*, CLINICAL ADVISOR (Feb. 16, 2018), <https://www.clinicaladvisor.com/home/topics/infectious-diseases-information-center/influenza-information-center/cdc-influenza-vaccine-25-effective-against-h3n2-in-2017-2018/>.

<sup>73</sup> Pless, et al., *supra* note 48, at 3.

<sup>74</sup> *Id.*

<sup>75</sup> Committee on Infectious Disease, *Influenza Immunization for All Health Care Personnel: Keep It Mandatory*, 136(4) AAP NEWS & JOURNALS GATEWAY 809, 811, (Oct. 2015).

the country have made the switch from voluntary policies to mandatory policies subsequent to their due diligence in examining the policies of other institutions.<sup>76</sup>

One of the reasons why voluntary programs have shown to be ineffective is the misconceptions that exist about the risk and benefits of the influenza vaccine by healthcare workers.<sup>77</sup> Suggestions that the influenza vaccine itself is not effective and may sometimes produce adverse effects seem to be among the biggest misconceptions.<sup>78</sup> A shared concern among those who opt out of immunization is, “Why should I risk a serious side effect like Guillain-Barré syndrome for a vaccine that may only be 60% effective?”<sup>79</sup> This question indicates that the common notion is that the adverse effects of influenza vaccine have more serious consequences than the disease itself.<sup>80</sup> The CDC has provided that the effectiveness of the influenza vaccination varies each flu season.<sup>81</sup> However, those indicating that the vaccine is 60% effective are not far off. Although the effectiveness of the flu vaccine varies, recent studies have demonstrated that the flu vaccination reduced the risk of flu by between 40% and 60% among the overall population during flu season.<sup>82</sup>

Regardless of the number, a healthcare worker who has received the influenza vaccination is much more likely to prevent the spread of this transmittable disease to other employees and patients than an individual who receives no vaccination at all. Although volunteer programs are a

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<sup>76</sup> Steven Porter, *Too Far or Far Enough? Mandatory Flu Vaccine Policies In Healthcare*, HEALTHLEADERS, (Mar. 9, 2018), <https://www.healthleadersmedia.com/clinical-care/too-far-or-far-enough-mandatory-flu-vaccine-policies-healthcare>.

<sup>77</sup> *Id.*

<sup>78</sup> Margaret Gray, et al., *Should Influenza Immunization Be Mandatory for All Healthcare Providers?*, 68 CAN J HOSP. PHARM. 60-61, (2015).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Vaccine Effectiveness - How Well Does the Flu Vaccine Work?*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 12, 2018), [https://www.cdc.gov/flu/vaccines-work/vaccineeffect.htm?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fflu%2Fabout%2Fqa%2Fvaccineeffect.htm](https://www.cdc.gov/flu/vaccines-work/vaccineeffect.htm?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fflu%2Fabout%2Fqa%2Fvaccineeffect.htm).

<sup>82</sup> *Id.*

step in the right direction, when given the option of whether to receive the vaccination or not, healthcare workers are making their decisions on faulty preconceived notions.

## VII. Lack of Enforcement Mechanisms

Another point of contention concerns the lack of enforcement surrounding mandatory vaccination policies. Proponents of stronger enforcement mechanisms suggest that mandatory policies are mere recommendations without some type of penalty attached.<sup>83</sup> A recent Illinois law seeks to increase influenza vaccinations at approximately 3,000 state-licensed health care facilities by making it difficult for employees to decline the vaccination.<sup>84</sup> The public health department's new rule requires all facilities to offer the influenza vaccine to employees and only permit objections based on religious beliefs or medical disabilities.<sup>85</sup> Previously, the law allowed for philosophical objections or "moral reluctance" when choosing to decline the vaccine.<sup>86</sup>

## VIII. Conclusion

Unvaccinated healthcare workers can place themselves, colleagues, and patients at risk of getting influenza. There should be a state by state mandate that healthcare workers receive influenza vaccinations prior to interactions with patients. It is no surprise that employers lose substantial productivity when employees are forced to stay home when they are sick, or worse, show up to work sick. Mandating that healthcare workers receive an influenza vaccination can reduce the risk of lost productivity by ensuring that the healthcare facility is a safe and healthy environment for all. Although some states have taken the initiative and begun implementing

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<sup>83</sup> Matthew K. Wynia, *Mandating Vaccination: What Counts as a "Mandate" in Public Health and When Should They be Used?*, THE AMERICAN JOURNAL OF BIOETHICS, 7:12, 2-6, (Dec. 19, 2007).

<sup>84</sup> Christine Herman, *Illinois Tightens Flu Shot Requirements for Health Workers. But Who's Enforcing it?*, SIDE EFFECTS PUBLIC HEALTH PERSONAL STORIES, (Oct. 9, 2018), <https://www.sideeffectspublicmedia.org/post/illinois-tightens-flu-shot-requirements-health-workers-who-s-enforcing-it>.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

influenza vaccination requirements on an individual level, more can be done at the state level.

Healthcare workers should get the flu vaccine, not the flu.