



Review

Legal considerations surrounding mandatory influenza vaccination for healthcare workers in the United States

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ABSTRACT

Recent years have brought increased focus on the desirability of vaccinating more healthcare workers against influenza. The concern that novel 2009 H1N1 influenza A would spark a particularly severe influenza season in 2009–2010 spurred several institutions and one state to institute mandatory vaccination policies for healthcare workers, and several new mandates have been introduced since then. Some healthcare workers, however, have voiced objections in the media and in legal proceedings. This paper reviews the characteristics of influenza and how it is transmitted in the healthcare setting; surveys possible constitutional, administrative, and common law arguments against mandates; assesses the viability of those arguments; and identifies potential new legal strategies to support influenza vaccine mandates. It is intended to assist those involved in the regulation and administration of public and private healthcare institutions who may be considering approaches to mandates but have concerns about legal challenges.

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1. Introduction

The emergence of a novel strain of influenza in the spring of 2009 heightened the urgency of initiatives to vaccinate more healthcare workers against influenza. Because these healthcare workers

are ideally situated to acquire and transmit influenza infections, and many of their patients are at high risk of severe complications from influenza, the healthcare workers are encouraged to get vaccinated. In 2004, Virginia Mason Medical Center in Seattle became the first major healthcare employer to institute a true influenza vaccine mandate – one that employees could not avoid simply by declining the vaccine [1,2]. In August of 2009, the State of New York promulgated a short-lived mandate for its licensed healthcare facilities, and Rhode Island recently adopted the only state mandate currently in effect [3,4]. Though other vaccines (such as MMR and varicella) are already largely mandated, policies like

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these regarding influenza vaccination have drawn opposition from some healthcare workers (among others) who prefer not to receive the vaccine for various reasons [5]. These disputes raise interesting legal questions about attempts to ensure that healthcare workers do not transmit influenza to patients.

2. Influenza and influenza vaccination rates in healthcare workers

Influenza is of special concern in the healthcare setting, as influenza outbreaks have been linked to unvaccinated healthcare workers [6]. Because healthcare workers come into contact with multiple patients every day, as many as one-quarter of healthcare workers may be infected with influenza each year. During the 1993–1994 season, 23.2% of workers in a Glasgow hospital had serological evidence of influenza infection [7]. In addition, patients at higher risk for influenza often have closer contact with healthcare workers, compared to people not seeking medical services [6]. These healthcare workers can then transmit the infection to infants, the elderly, the immunocompromised, and other vulnerable populations [8–13]. An infected person can transmit the disease at least one day before experiencing symptoms, and as many as half of cases may be entirely subclinical. Many healthcare workers who are aware that they are ill come to work anyway, and continue to shed virus for 5–10 days [14–17].

Influenza vaccine is an effective and safe method of preventing influenza among healthcare workers [8,18]. It reduces absenteeism, which not only keeps staffing at normal levels overall but also reduces the need to float healthcare workers to unfamiliar areas, which can decrease quality of care [19,20]. Most important, vaccination decreases nosocomial transmission of influenza [21–25].

A recent systematic review of methods to increase healthcare worker influenza vaccination identified three studies on the effect of mandatory influenza vaccination in a hospital setting, all of which reported on programs that achieved vaccination rates of 98% or greater [26]. The highest exemption rate in any of these studies was 1.2%, and less than 0.2% of healthcare workers in each study refused vaccination [5,27,28]. These results are in line with a recent MMWR report which noted that influenza vaccination coverage among healthcare workers in hospitals with mandatory vaccination was 95.2%, compared to 68.2% in hospitals with no such rule [29]. This increase in coverage is important, as it is estimated that one patient life is saved for every eight long-term healthcare workers who receive influenza vaccine, and modeling predicts the effect of hospital healthcare worker vaccination to be similar in magnitude to that of vaccinating long-term care workers [30,31].

3. Conventional methods of healthcare worker vaccination

Many healthcare institutions offer their healthcare workers positive incentives, convenient vaccine access, and education promoting influenza vaccination. Some require healthcare workers who decline vaccination to sign statements acknowledging the risk they impose upon others [32]. Still, only about two-thirds of healthcare workers got the influenza vaccine in the 2011–2012 season, and rates were even lower in the recent past [29,33]. Education has been surprisingly unsuccessful in increasing coverage [17]. Reasons commonly given for refusing the vaccine include fear of adverse reactions, apathy about the threat posed by influenza, inconvenience, belief that the worker will not get influenza, and doubts about vaccine efficacy [26].

In contrast with strategies that are limited to education and communication, a mandate raises rates quickly and cost-effectively [34,35]. This success is unsurprising in light of the dramatic impact of school immunization mandates in raising childhood

Table 1

Areas of law pertinent to healthcare worker vaccination mandates.

Constitutional	Statutory	Other
Substantive due process Equal protection	ADA Civil Rights Act of 1964; state civil rights statutes HIPAA	Good faith and fair dealing Wrongful discharge
Establishment and free exercise clauses Procedural due process State constitutions	OSHA – federal, state Medicare/Medicaid Licensing: professionals, facilities Emergency authority	Battery; invasion of privacy Negligence of institution Public nuisance Union contracts

immunization rates [36]. In 2009, the Children's Hospital of Philadelphia introduced an employee vaccine mandate. Exemptions were offered for medical or religious reasons and employees were offered education and counseling; ultimately only nine out of over 9000 employees refused vaccination and were dismissed [37]. While 75% of employees found the mandate coercive, 90% perceived it as important to patient safety and ethics [30]. The American Academy of Pediatrics, the Infectious Diseases Society of America, The National Vaccine Advisory Committee, and the Society for Healthcare Epidemiology of America are among the entities that have endorsed healthcare worker influenza vaccine mandates [6,32,38,39].

The ethics of mandates have been debated in the medical literature. One of the main supporting arguments for such mandates is the duty of a healthcare worker to protect both the safety of individual patients and the public health [40]. In opposition to the mandates is the argument that healthcare workers are entitled to personal autonomy [41]. These ideals are competing in court as healthcare worker unions contest employers' attempts to institute influenza vaccination mandates. Mandates invoke a variety of legal issues, including state and federal constitutional law, the applicability of state and federal statutes, and the operation of state laws governing contracts and torts (Table 1).

4. Constitutionality of government vaccine mandates

The United States Constitution provides that governmental units must afford due process in legal actions, protect individuals equally under the law, and permit the free exercise of religion. The element of due process most pertinent to mandates is substantive in that certain types of personal liberties are shielded from unjustified government intrusion. The doctrines of equal protection and free exercise prohibit governmental acts that unfairly impair religious practice.

4.1. Due process rights

A court evaluating a due process challenge to a healthcare worker vaccination mandate would balance the plaintiff's interest in being free to reject vaccination against the importance of community safety [42]. For example, the Supreme Court did so in *Jacobson v Massachusetts*, which found that in cases where common welfare is at stake, the power of the state may limit individual freedom [43]. This is considered the seminal case in immunization and public health law. The balance seems likely to tip toward mandates for two reasons. First, states have broad latitude to circumscribe individual liberties whose exercise creates a risk of harm to others, as with school immunization mandates, which have been unambiguously pronounced constitutional [44,45]. Second, a healthcare worker's failure to be vaccinated endangers many [45].

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