

Masking Your Rights: Facemask Requirements Under Mandatory Influenza-Vaccination Policies Violate Privacy Rights of Health Care Workers

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TABLE OF CONTENTS

I.	INTRODUCTION	428
II.	BACKGROUND ON MANDATORY INFLUENZA-VACCINATION POLICIES.....	431
	A. <i>Why are Hospitals Mandating Influenza Shots for Health Care Workers?</i>	431
	B. <i>Why are Health Care Workers Refusing Influenza Shots?</i>	434
III.	LEGAL IMPLICATIONS OF FACEMASK REQUIREMENTS	439
	A. <i>Legal Background of Mandatory Vaccination Programs</i>	439
	B. <i>Privacy Rights of Health Care Workers Violated by Facemask Requirements</i>	446
	1. <i>Common Law Right to Privacy</i>	447
	2. <i>Federal Constitutional Right to Privacy</i>	451
	3. <i>Statutory Right to Privacy: Health Insurance Portability and Accountability Act of 1996 (HIPAA)</i>	455
IV.	RECOMMENDATIONS	460
	A. <i>Other Strategies for Decreasing the Spread of Influenza</i>	461
	B. <i>Efficacy of Facemasks in Infection Control</i>	463

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C. Overall Recommendation.....	466
V. CONCLUSION	468

I. INTRODUCTION

For eleven years, Carla Brock was a board-certified holistic nurse at Cox Medical Center South in Springfield, Missouri.¹ In 2012, for the first time, CoxHealth, owner of Cox Medical Center South, implemented a mandatory influenza-vaccination policy for all of its health care employees.² Ms. Brock properly applied for a religious exemption from the mandatory shot, and the hospital granted her application.³ Under the hospital's policy, employees who received exemptions were required to wear facemasks while on duty as a part of the hospital's infection-control practices.⁴

However, Ms. Brock did not wish to wear a mask at work for a number of reasons. First, she believed that the mask was a *scarlet letter*, singling her out from other hospital staff as someone who had not received the influenza shot.⁵ Ms. Brock startled her patients every time she entered a room, and her patients instinctively feared that something was wrong.⁶ Her patients' reactions compelled Ms. Brock to explain why she was wearing a mask to reassure them that nothing was out of the ordinary.⁷ However, this exchange required her to divulge her religious objections to the influenza vaccine—something that would not have otherwise come up with her patients.⁸ Second, Ms. Brock believed that the facemasks were punitive, meant to coerce those with qualifying exemptions into receiving the vaccine in lieu of complying with the facemask requirement.⁹ Third, Ms. Brock found that the facemask impaired her physical ability to

1. Thomas Gounley, *Nurse with No Influenza Shot Refuses to Wear Mask, Is Fired*, USA TODAY (Jan. 8, 2013, 12:41 PM), <http://www.usatoday.com/story/news/nation/2013/01/08/flu-mask-termination/1817571/> [https://perma.cc/3DYW-J2Z8]. Cox Medical Center South is a full-service, tertiary care facility, calling itself the “jewel of the medical mile.” *Cox Medical Center South*, COXHEALTH, <http://www.coxhealth.com/body.cfm?id=1344> [https://perma.cc/DFB2-7C32] (last visited Mar. 10, 2016).

2. Gounley, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.* A *scarlet letter* is a symbol worn as a punitive mark of adultery. *Scarlet Letter*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/scarlet%20letter> (last visited Mar. 10, 2016). The term is derived from Nathaniel Hawthorne's 1850 novel, *THE SCARLET LETTER* (Ticknor & Fields eds., 1850).

6. Gounley, *supra* note 1.

7. *Id.*

8. *Id.*

9. *Id.*

perform her job; the masks gave her headaches and made it difficult for her to breathe comfortably.¹⁰

For these reasons, Ms. Brock raised her concerns to her supervisors at the hospital.¹¹ After the administrators at CoxHealth offered Ms. Brock no alternatives to the facemask requirement when she brought her issues to their attention, Ms. Brock ultimately declined to wear the debilitating facemask.¹² Although this personal decision seemed reasonable to Ms. Brock, CoxHealth terminated her.¹³ Ms. Brock lost her job of over a decade.¹⁴

Ms. Brock is one of many health care workers who have to choose between earning a living and being marked by the *scarlet letter* of a facemask every influenza season.¹⁵ Since the H1N1 swine influenza outbreak in 2009, a

10. *Id.* In 2009, during the swine flu outbreak, a *New York Times* reporter conducted an informal social experiment to see how the New York public would react to her going about her day in a Pandemic Emergency Defense System—a flu protection kit that included a facemask, gloves, industrial-strength goggles, and a white paper jumpsuit. Ariel Kaminer, *What Not to Wear When Worrying About the Flu*, N.Y. TIMES (Sept. 11, 2009), <http://www.nytimes.com/2009/09/13/nyregion/13critic.html>. The reporter wanted to test “the outer limits of swine flu paranoia” and “the tolerance of New Yorkers.” *Id.* One of the things that surprised the reporter most was how physically uncomfortable the facemask was. *Id.* The facemask made her want to pass out because it “seemed to be filtering out all the oxygen.” *Id.*

11. Gounley, *supra* note 1.

12. *Id.*

13. *Id.*

14. *Id.*

15. Ms. Brock is not alone in her termination for refusing a flu shot and a facemask. *See, e.g.*, Carol Comegno, *Women Fired for Refusing Flu Shot File Suit*, COURIER-POST (Dec. 28, 2015, 3:10 PM), <http://www.courierpostonline.com/story/news/2015/12/21/flu-shot-vaccine-refusal-lawsuit/77708218/> [<https://perma.cc/JME5-7JLN>] (reporting that religious social-service organization fired two ancillary-services healthcare workers for refusing flu shot and facemask); Ryan Grenoble, *Goshen Hospital Employees Fired After Refusing Mandatory Flu Shot*, HUFFPOST HEALTHY LIVING (Jan. 3, 2013, 5:20 PM), http://www.huffingtonpost.com/2013/01/03/goshen-hospital-employees-fired-flu-shot_n_2404328.html [<https://perma.cc/6FEN-2XF7>] (reporting that Goshen Hospital fired eight employees for refusing the influenza vaccine, including Mennonite nurse Ethel Hoover); *Katy Nurse Fired for Refusing Flu Shot*, KHOU.COM (Dec. 31, 2013, 9:40 PM), <http://www.khou.com/story/news/health/2014/07/24/12300160/> [<https://perma.cc/8YLA-G2A2>] (reporting that Christus St. Catherine Hospital fired Houston nurse Kerriann Wilkie for refusing the flu shot); *Pregnant Nurse, Dreonna Breton, Fired for Refusing Flu Vaccine*, HUFFPOST PARENTS (Dec. 31, 2013, 10:45 AM), http://www.huffingtonpost.com/2013/12/31/dreonna-breton-flu-vaccine-pregnant-nurse-fired_n_4520298.html [<https://perma.cc/TRH7-W8MS>] (reporting that an employer fired a three-months pregnant nurse, Dreonna Breton, for refusing the employer’s mandatory flu vaccine requirement). The Centers for Disease Control and Prevention (CDC) define *health care workers* as including, but not limited to: “physicians, nurses, nursing assistants, therapists, technicians, emergency medical

growing number of hospitals and other health care facilities have enacted mandatory influenza-vaccination policies for all health care workers in an effort to increase vaccination rates and, in their view, patient safety.¹⁶ These policies have raised a number of legal issues under the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA), as well as legal issues pursuant to collective bargaining agreements between union employees and health care facilities.¹⁷ Most health care employers avoid legal complications by allowing health care workers to receive medical and religious exemptions under their mandatory vaccination programs.¹⁸ However, employers that grant accommodations excusing a health care worker from mandatory vaccinations usually impose some form of additional infection-control practice, such as requiring exempt health care workers to wear facemasks while on duty.¹⁹

Hospitals should abandon the facemask requirements in their mandatory influenza-vaccination programs because the facemasks can infringe on the privacy rights of health care workers, and hospitals can still achieve their vaccination goals through less restrictive practices. Part II introduces the recent rise of mandatory influenza-vaccination policies for health care workers, how hospitals exempt certain employees, and the consequences for those exempted. Part III discusses the legal implications of requiring exempted employees to wear facemasks and other identifying material

service personnel, dental personnel, pharmacists, laboratory personnel, autopsy personnel, students and trainees, contractual staff not employed by the health-care facility, and persons . . . not directly involved in patient care but potentially exposed to infectious agents that can be transmitted to and from health care workers and patients”—“clerical, dietary, housekeeping, laundry, security, maintenance, administrative, billing, and volunteers.” *Influenza Vaccination Information for Health Care Workers*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/healthcareworkers.htm> [<https://perma.cc/VE2Y-S4BZ>] (last updated Sept. 17, 2015).

16. See, e.g., Lauren Cox & ABC News Medical Unit, *Some Nurses Say No to Mandatory Flu Shots*, ABC NEWS (Oct. 2, 2009), <http://abcnews.go.com/Health/SwineFlu/News/mandatory-flu-vaccines-upset-nurses/story?id=8727353> [<https://perma.cc/63LZ-3DZA>] (describing an influenza and swine flu vaccine mandate for all state health care workers in New York, and noting similar mandates by hospitals in Washington, Illinois, Missouri, Georgia, and Pennsylvania). For a defense of vaccine mandates, see Abigale L. Ottenberg, Joel T. Wu, Gregory A. Poland, Robert M. Jacobson, Barbara A. Koenig & Jon C. Tiburt, *Vaccinating Health Care Workers Against Influenza: The Ethical and Legal Rationale for a Mandate*, 101 AM. J. PUB. HEALTH 212, 212 (2011).

17. See Lisa H. Randall, Eileen A. Curran & Saad B. Omer, *Legal Considerations Surrounding Mandatory Influenza Vaccination for Healthcare Workers in the United States*, 31 VACCINE 1771, 1773–74 (2013).

18. See Ottenberg et al., *supra* note 16, at 212 (noting that the American Medical Association’s Council on Ethical and Judicial Affairs “concluded [that] physicians have an obligation to . . . [a]ccept immunization absent a recognized medical, religious, or philosophical reason to not be immunized[.]”).

19. See Randall et al., *supra* note 17, at 1773–74.

under federal and state privacy law. Part IV recommends that health care employers abandon facemask requirements in their mandatory-vaccination programs in order to avoid privacy violations.²⁰ Part V concludes.

II. BACKGROUND ON MANDATORY INFLUENZA-VACCINATION POLICIES

Over the last few years, health care facilities have started to implement on-site influenza-vaccination programs.²¹ Although hospitals have formalized their requirements for all employees, there are still health care workers who refuse the vaccination for various reasons.²²

A. *Why are Hospitals Mandating Influenza Shots for Health Care Workers?*

The Centers for Disease Control and Prevention (CDC) estimate that, every year, the influenza virus infects 5% to 20% of Americans, with more than 200,000 flu-related hospitalizations.²³ From 1976 to 2006, flu-associated deaths in the United States ranged from 3,000 to 49,000 annually.²⁴ In 2005, influenza was the sixth leading cause of death among American adults and

20. This Comment will not discuss the related legal issues under collective bargaining agreements for union-member health care workers. In general, unions argue that hospitals change the terms and conditions of health care workers' employment by requiring employees to receive vaccination. In *Virginia Mason Hospital v. Washington State Nurses Ass'n*, the U.S. Court of Appeals for the Ninth Circuit upheld an arbitrator's decision that Virginia Mason Hospital's unilateral adoption of a mandatory influenza shot policy without bargaining over it with union representatives violated the collective bargaining agreement. 511 F.3d 908, 917 (2007). For further discussion of mandatory vaccination policies and union employees, see Alexandra M. Stewart, Arthur Caplan, Marisa A. Cox, Kristen H.M. Chang & Jacqueline E. Miller, *Mandatory Vaccination of Health-Care Personnel: Good Policy, Law, and Outcomes*, 53 JURIMETRICS J. 341, 341–59 (2013).

21. Gregory A. Poland, Pritish Tosh & Robert M. Jacobson, *Requiring Influenza Vaccination for Health Care Workers: Seven Truths We Must Accept*, 23 VACCINE 2251, 2254 (2005).

22. F. Hofmann, C. Ferracin, G. Marsh & R. Dumas, *Influenza Vaccination of Healthcare Workers: A Literature Review of Attitudes and Beliefs*, 34 INFECTION 142, 145 (2006) (discussing thirty-two primary publications reporting influenza-vaccination coverage among health care workers between 1985 and 2002).

23. *Seasonal Influenza, More Information*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/about/qa/disease.htm> [<https://perma.cc/CD9M-MU9P>] (last updated May 4, 2016).

24. *Id.*

directly cost the country between \$3 billion and \$5 billion in health care expenditures.²⁵

Health care workers are in a special position because spreading the influenza virus in a hospital setting presents unique patient-care risks. Many of the patients that hospitals and health care facilities treat include the elderly, young children, immunocompromised individuals, and critically ill patients.²⁶ Because complications from the influenza virus are particularly dangerous to these vulnerable patients, it is important that health care workers who interact with these particular groups receive immunization.²⁷ One study found that a hospital with a significant increase in health-care-worker vaccination rates saw the rates of laboratory-confirmed cases of hospital-acquired influenza in health care workers decrease by one-third.²⁸

Proponents of mandatory vaccination programs for health care workers suggest that health care workers have an ethical duty to receive influenza vaccinations. Under the four principles of biomedical ethics—nonmaleficence, beneficence, respect for patient autonomy, and fair treatment of all patients—some argue that health care professionals have the obligation and responsibility to prevent potential harm to their patients by reducing the transmission of preventable diseases.²⁹ This view suggests that because health care workers have freely chosen their occupations, restrictions on

25. Poland et al., *supra* note 21, at 2252, nn.9, 13 (citing William W. Thompson, David K. Shay, Eric Weintraub, Lynnette Brammer, Nancy Cox, Larry J. Anderson & Keiji Fukuda, *Mortality Associated with Influenza and Respiratory Syncytial Virus in the United States*, 289 J. AM. MED. ASS'N 179, 179 (2003); Bradley N. Doebbeling, Michael B. Edmond, Charles S. Davis, James R. Woodin & Rodney R. Zeitler, *Influenza Vaccination of Health Care Workers: Evaluation of Factors That Are Important in Acceptance*, 26 PREVENTIVE MED. 68, 68 (1997)).

26. *Id.* at 2252.

27. *Id.*

28. Cassandra D. Salgado, Eve T. Giannetta, Frederick G. Hayden & Barry M. Farr, *Preventing Nosocomial Influenza by Improving the Vaccine Acceptance Rate of Clinicians*, 25 INFECTION CONTROL & HOSP. EPIDEMIOLOGY 923, 925–26 (2004) (reporting that over the same period health care-worker vaccination compliance rose from 4% to 67%, nosocomial influenza cases in hospital patients fell from 32% to 3%). Hospital-acquired infections—nosocomial infections—are infections that are acquired in hospitals or other health care facilities by patients who had been admitted for reasons other than the infection. Heaven Stubblefield, *Hospital-Acquired (Nosocomial) Infections*, HEALTHLINE (Jan. 16, 2014), <http://www.healthline.com/health/hospital-acquired-nosocomial-infections#Overview1> [<https://perma.cc/63BG-XESD>].

29. Ottenberg et al., *supra* note 16, at 213 n.39, 41 (citing TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 12 (5th ed. 2001); Matthew K. Wynia, *Mandating Vaccination: What Counts as a “Mandate” in Public Health and When Should They Be Used?*, AM. J. BIOETHICS, Dec. 2007, at 2, 5); see also J.J.M. van Delden, R. Ashcroft, A. Dawson, G. Marckmann, R. Upshur & M.F. Verweij, *The Ethics of Mandatory Vaccination Against Influenza for Health Care Workers*, 26 VACCINE 5562 (2008) (discussing mandatory influenza vaccination of health care workers and medical ethics).

their individual liberties are acceptable when in furtherance of public health.³⁰

The CDC has long recommended that health care workers receive influenza vaccinations.³¹ However, despite efforts to increase the rate of health care worker vaccinations on a voluntary basis, rates remained low with voluntary programs.³² In 2010, the national vaccination rate for health care workers was a mere 44%.³³ Case studies demonstrated that mandatory, as opposed to voluntary, vaccination programs were much more successful in increasing the rate of influenza vaccination in health care workers.³⁴ Virginia Mason Medical Center, in Seattle, Washington, was one of the first health care facilities to enact a mandatory influenza-vaccination program for its employees.³⁵ Virginia Mason saw an increase in their vaccination rate from 54% in 2003 to 97.6% in 2005 when the center first implemented the mandatory vaccination program.³⁶ Further, BJC HealthCare, a large Midwestern health care organization with approximately 26,000 employees, saw a 26.5% increase in their vaccination rate to 98.4% after implementing a mandatory program.³⁷ In the 2013–2014 influenza season, the CDC estimated that 62.9% of health care workers had received immunization, while 85.8% of health care workers who had an employer requirement received the vaccination.³⁸ Because of the demonstrated efficacy of mandatory programs in increasing rates of vaccination, many national health-advisory organizations, including the American Hospital Association, Infectious

30. Ottenberg et al., *supra* note 16, at 213.

31. Poland et al., *supra* note 21, at 2253.

32. Robert M. Rakita, Beverly A. Hagar, Patricia Crome & Joyce K. Lammert, *Mandatory Influenza Vaccination of Healthcare Workers: A 5-Year Study*, 31 *INFECTION CONTROL & HOSP. EPIDEMIOLOGY* 881, 881–82 (2010).

33. *Id.* at 881 (citing Anthony E. Fiore, David K. Shay, Karen Broder, John K. Iskander, Timothy M. Uyeki, Gina Mootrey, Joseph S. Bresee & Nancy J. Cox, *Prevention and Control of Seasonal Influenza with Vaccines: Recommendations of the Advisory Committee on Immunization Practices (ACIP), 2009*, *MORBIDITY & MORTALITY WKLY. REP. RECOMMENDATIONS & REP.*, July 2009, at 1, 26 tbl.3).

34. *See id.* at 881, 883.

35. *Id.* at 882. Virginia Mason Medical Center also faced a union lawsuit based on this mandatory program. *Virginia Mason Hosp. v. Wash. State Nurses Ass'n*, 511 F.3d 908, 917 (9th Cir. 2007).

36. Rakita et al., *supra* note 32, at 883. The vaccination rate dropped to 29.5% in 2004 due to a national influenza vaccine shortage. *Id.*

37. Hilary M. Babcock, Nancy Gemeinhart, Marilyn Jones, W. Claiborne Dunagan & Keith F. Woeltje, *Mandatory Influenza Vaccination of Health Care Workers: Translating Policy to Practice*, 50 *CLINICAL INFECTIOUS DISEASES* 459, 460, 461 (2010).

38. *Influenza Vaccination Information for Health Care Workers*, *supra* note 15.

Disease Society of America, Association for Professionals in Infection Control, and American College of Physicians, now support mandatory influenza immunization for health care workers.³⁹

Mandatory vaccination programs have proliferated due to studies that have demonstrated the decrease of hospital-acquired influenza in health care workers correlating with increased vaccination rates and, in turn, the increase in vaccination rates with mandatory programs.⁴⁰

B. Why Are Health Care Workers Refusing Influenza Shots?

Although health care employers support the administration of mandatory influenza vaccines, some health care workers would rather not receive the influenza shot. Facemask requirements only affect health care workers who have refused the flu shot.⁴¹ Therefore, identifying the reasons why health care workers refuse the flu shot is an important task for health care administrators designing mandatory vaccination programs because facemask requirements can violate the rights of this particular group.

The major objections that health care workers have against mandatory influenza vaccinations stem from: (1) religious objections; (2) medical contraindications; (3) fear of adverse effects;⁴² and (4) disbelief in the efficacy of the flu vaccine.⁴³ Other objections arise from misconceptions that the vaccination can cause influenza itself, misconceptions that the individual

39. James M. Keegan, R. Vivian Derby, Tamara Rhames & Beth Boersma, *Vaccination and the Health Care Worker*, 66 S.D. MED. (SPECIAL ISSUE) 101, 107 (2013).

40. See Salgado et al., *supra* note 28, at 925–26 (finding a significant increase in compliance with influenza vaccination by health care workers and that, during the same period, the increase was associated with significant reductions in laboratory-confirmed cases of influenza among health care workers and hospital patients); Rakita et al., *supra* note 32, at 881, 883.

41. See Keegan et al., *supra* note 39, at 107.

42. In seventeen studies, 8% to 54% of health care workers noted that a fear of adverse effects from the flu vaccination was the most dissuasive pressure not to get it. Hofmann et al., *supra* note 22, at 142, 145 (discussing thirty-two primary publications reporting influenza-vaccination coverage among health care workers between 1985 and 2002).

43. In eighteen studies, 3% to 32% of health care workers, except physicians, considered influenza vaccine to be inefficient in preventing the disease and therefore not worth having. *Id.* at 145 nn.23, 25 (citing Daniel A. Nafziger & Loreen A. Herwaldt, *Attitudes of Internal Medicine Residents Regarding Influenza Vaccination*, INFECTION CONTROL & HOSP. EPIDEMIOLOGY 32, 34 tbl.1 (1994); Constance T. Pachucki, Joseph R. Lentino & George Gee Jackson, *Attitudes and Behavior of Health Care Personnel Regarding the Use and Efficacy of Influenza Vaccine*, 151 J. INFECTIOUS DISEASES 1170, 1170 (1985)). In another investigation, 44% of homoeopathic physicians refused influenza vaccination and only 21% voted for its application. *Id.* at 145 n.12 (citing Philipp Lehrke, Matthias Nuebling, Friedrich Hofmann & Ulrich Stoessel, *Attitudes of Homoeopathic Physicians Towards Vaccination*, 19 VACCINE 4859 (2001)).

is not at risk, inconvenient times and locations of vaccinations, doubts that influenza is a serious disease, and fear of injections.⁴⁴

First, some health care workers do not wish to receive the influenza shot for religious reasons.⁴⁵ Although some believe that a number of religions forbid vaccinations outright, many restrictions come from personal beliefs and not from religious doctrines themselves.⁴⁶ For example, although Amish religious doctrine does not prohibit immunization, vaccination rates vary widely in Amish communities.⁴⁷ Studies attribute the low rates of immunization in most Amish communities to the Amish view opposing modernity.⁴⁸ Likewise, until the 1940s, Jehovah's Witnesses banned their members from vaccination.⁴⁹ However, in 1952, church officials amended the doctrine

44. In sixteen studies, 6% to 58% of health care workers expressed the feeling of being healthy and having good natural defenses towards influenza infection. *Id.* Further, 6% to 59% of health care workers found the times and locations of vaccination unsuitable. *Id.* "This was the most common reason given by medical house staff and students." *Id.*

45. The subject of health care workers' objections to mandatory flu vaccinations has an interesting counterpart in the mandatory vaccination of school children. *See, e.g.,* James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831 (2002) (discussing various concerns surrounding school vaccination requirements throughout history); Linda E. LeFever, Comment, *Religious Exemptions from School Immunization: A Sincere Belief or a Legal Loophole?*, 110 PA. ST. L. REV. 1047, 1063–64 (2006) (arguing that states should eliminate the religious exemption from school immunization laws to avoid Equal Protection Clause issues).

46. John D. Grabenstein, *What the World's Religions Teach, Applied to Vaccines and Immune Globulins*, 31 VACCINE 2011, 2019 nn.25, 143, 219 (2013) (citing Thomas Novotny, Charles E. Jennings, Mary Doran, C. Ralph March, Richard S. Hopkins, Steven G.F. Wassilak & Lauri E. Markowitz, *Measles Outbreaks in Religious Groups Exempt from Immunization Laws*, 103 PUB. HEALTH REP. 49, 52 (1988); Carolyn Roy-Bernstein, Linda D. Sagor & Kenneth B. Roberts, *Treatment of a Jehovah's Witness with Immune Globulin: Case of a Child with Kawasaki Syndrome*, 94 PEDIATRICS 112 (1994); Daniel A. Salmon, Lawrence H. Moulton, Saad B. Omer, M. Patricia deHart, Shannon Stokely & Neal A. Halsey, *Factors Associated with Refusal of Childhood Vaccines Among Parents of School-Aged Children*, 159 ARCHIVES PEDIATRICS & ADOLESCENT MED. 470 *passim* (2005)).

47. *Id.* at 2015.

48. *Id.*

49. *Id.* at 2016 n.138 (citing Paul Grundy, *Dangerous Medical Advice and Changes*, FACTS ABOUT JEHOVAH'S WITNESSES, <http://www.jwfacts.com/watchtower/medical.php#vaccinations> [<https://perma.cc/4GX5-VEKW>] (last visited May 14, 2016)); *see* Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1583 (2014).

to a neutral view on vaccines.⁵⁰ Church of Christ, Scientist—Christian Science—on the other hand, is notable for being one of the only religions that opposes vaccinations outright as a part of its religious doctrine.⁵¹ A principle tenet of the Christian Science faith is the spiritual healing of disease, in which prayer prevents or cures disease.⁵² Therefore, Christian Science members openly decline most medical treatment, including common vaccinations.⁵³ Health care workers with religious objections to the flu vaccine make up a considerable proportion of the unvaccinated health care workers who are affected by facemask requirements in mandatory programs.⁵⁴

Next, health care professionals advise health care workers with medical contraindications, most often with an allergy to some component of the vaccine, not to receive the influenza vaccine.⁵⁵ For example, vaccine manufacturers use chicken eggs to produce the most commonly available influenza vaccines on the market.⁵⁶ Therefore, doctors advise those with egg allergies, while distinguishable from those allergic to components in the vaccine itself, not to receive the most commonly available influenza vaccine.⁵⁷ However, the CDC advises clinicians, based on their professional judgment, to vaccinate even in the presence of a medical precaution because the CDC believes that the benefit of vaccination outweighs the risk of adverse reaction from an allergy.⁵⁸ In most instances, even health care workers

50. Grabenstein, *supra* note 46, at 2016 (citing WATCH TOWER BIBLE & TRACT SOC'Y, *Questions From Readers*, THE WATCHTOWER, Dec. 15, 1952, at 764). Jehovah's Witnesses is well-known for its dissent of blood-product doctrine, which expresses the view that only the shedding of Jesus's blood can save lives. *Id.* at 2015. However, standard influenza vaccines do not typically contain blood product. *See How Influenza (Flu) Vaccines Are Made*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/protect/vaccine/how-fluvaccine-made.htm> [<https://perma.cc/VU2S-BTAM>] (last updated Jan. 6, 2015).

51. Grabenstein, *supra* note 46, at 2015; Reiss, *supra* note 49, at 1583.

52. Grabenstein, *supra* note 46, at 2015.

53. *Id.* The CDC has reported repeated measles outbreaks among followers of Christian Science. *Outbreak of Measles Among Christian Science Students—Missouri and Illinois, 1994*, 43 MORBIDITY & MORTALITY WKLY. REP. 463, 463–65 (1994).

54. *See* Randall et al., *supra* note 17, at 1773 (“[M]any mandates in effect today exempt employees who have religious objections to vaccination. . .”).

55. *Seasonal Influenza Vaccine Safety: A Summary for Clinicians*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/flu/professionals/vaccination/vaccine_safety.htm [<https://perma.cc/NA9F-6EMZ>] (last updated Oct. 16, 2015).

56. *How Influenza (Flu) Vaccines Are Made*, *supra* note 50.

57. *Seasonal Influenza Vaccine Safety: A Summary for Clinicians*, *supra* note 55. On January 16, 2013, the FDA approved Flublok, a recombinant influenza vaccine produced completely egg-free. *Flublok Seasonal Influenza (Flu) Vaccine*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/flu/protect/vaccine/qa_flublok-vaccine.htm [<https://perma.cc/J8B2-ELQF>] (last updated Aug. 19, 2015).

58. *Seasonal Influenza Vaccine Safety: A Summary for Clinicians*, *supra* note 55.

with minor egg allergies can still safely receive the influenza vaccine produced using egg products when a doctor administers the vaccination with certain precautions.⁵⁹ Thus, health care workers with medical contraindications for the flu vaccine are typically a smaller group of the unvaccinated health care workers than those with religious objections.⁶⁰

Further, some health care workers choose not to receive the influenza vaccine because they, like many in the population at large, believe that there are adverse risks associated with the influenza vaccine.⁶¹ The health risk most commonly associated with the influenza vaccine is Guillain-Barré syndrome.⁶² In 1976, after an outbreak of swine influenza in New Jersey, the U.S. government enacted the National Influenza Immunization Program.⁶³ Studies following this vaccination program demonstrated that this particular influenza vaccine increased the relative risk of Guillain-Barré syndrome to 4.9–5.9 cases per million people.⁶⁴ In the 1990s, researchers found that the relative risk for Guillain-Barré syndrome was

59. *Id.*

60. *But see* Babcock et al., *supra* note 37, at 461 (analyzing the success of a mandatory vaccination program and finding that employees claimed medical exemptions nearly four times as often as religious exemptions).

61. There have been anti-vaccination movements throughout the history of vaccines. In as early as the 1830s, British communities rioted in reaction to a mandatory smallpox vaccination. Alexandra Minna Stern & Howard Markel, *The History of Vaccines and Immunization: Familiar Patterns, New Challenges*, 24 HEALTH AFF. 611, 617 n.33 (2005) (citing Martin Kaufman, *The American Anti-Vaccinationists and Their Arguments*, 41 BULL. HIST. MED. 463–78 (1967)). For further discussion regarding anti-vaccination movements, see Gary S. Marshall, *Roots of Vaccine Hesitancy*, 66 S.D. MED. (SPECIAL EDITION) 52 (2013), highlighting the sources of recent trends against vaccines.

62. *See* Kenrad E. Nelson, *Invited Commentary: Influenza Vaccine and Guillain-Barré Syndrome—Is There a Risk?*, 1129 AM. J. EPIDEMIOLOGY 1129, 1129 (2012) (focusing on the occurrence of Guillain-Barré syndrome following the 2009 swine flu episode due to the special reputation Guillain-Barré syndrome had following the 1976 swine flu vaccinations); *see, e.g.,* Stanback v. Parke, Davis & Co., 657 F.2d 642, 643 (4th Cir. 1981) (involving a plaintiff who suffered from a Guillain-Barré Syndrome reaction following the flu vaccine injection who brought a products liability case against the vaccine manufacturer for failure to warn of the risks).

63. Nelson, *supra* note 62, at 1130.

64. Alexander D. Langmuir, Dennis J. Bregman, Leonard T. Kurland, Neal Nathanson & Maurice Victor, *An Epidemiologic and Clinical Evaluation of Guillain-Barré Syndrome Reported in Association with the Administration of Swine Influenza Vaccines*, 119 AM. J. EPIDEMIOLOGY 841, 841–42 (1984); *see* Tamar Lasky et al., *The Guillain-Barré Syndrome and the 1992–1993 and 1993–1994 Influenza Vaccines*, 339 NEW ENG. J. MED. 1797, 1800 (1998).

only approximately one extra case for every million.⁶⁵ However, the concern that the influenza vaccine can increase the risk of contracting Guillain-Barré syndrome persists today.⁶⁶ In reality, the CDC finds that pain at the injection site is the most frequently reported side effect of the vaccine injection procedure.⁶⁷

Lastly, some health care workers would rather not receive the vaccine because they doubt the efficacy of the influenza vaccine.⁶⁸ Because influenza viruses are continuously mutating, manufacturers reformulate the influenza vaccine each influenza season based on decisions made by the U.S. Food and Drug Administration (FDA), which, in turn, considers recommendations made by the World Health Organization.⁶⁹ This decision rests on the research of more than one hundred national influenza centers around the world.⁷⁰ Although a significant amount of research goes into the influenza-vaccination formulations, it follows that the formulations differ year to year.⁷¹ Therefore, the efficacy of the influenza shot is extremely difficult to measure because its effectiveness varies depending on the year's formulation and how closely that formulation matches that year's circulating influenza viruses.⁷² Health care workers who cite this reason for refusing the shot find that the inconvenience of receiving the shot

65. Lasky et al., *supra* note 64, at 1797.

66. *Misconceptions About Seasonal Flu and Flu Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/about/qa/misconceptions.htm> [https://perma.cc/Y2L3-P2WK] (last updated Sept. 8, 2015).

67. *Seasonal Influenza Vaccine Safety: A Summary for Clinicians*, *supra* note 55. Approximately 64% of people vaccinated with the influenza vaccine via injection experience pain at the injection site, which typically resolves within a week of the injection. *Id.*

68. Hofmann et al., *supra* note 22, at 145 (discussing thirty-two primary publications reporting influenza-vaccination coverage among health care workers between 1985 and 2002).

69. *Selecting Viruses for the Seasonal Influenza Vaccine*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/about/season/vaccine-selection.htm> [https://perma.cc/J64V-K7Z4] (last updated May 4, 2016). For more information about the virus selection process, see Colin A. Russell et al., *Influenza Vaccine Strain Selection and Recent Studies on the Global Migration of Seasonal Influenza Viruses*, 26S VACCINE D31 (2008); *Recommended Composition of Influenza Virus Vaccines for Use in the 2014–2015 Northern Hemisphere Influenza Season*, WORLD HEALTH ORG. (Feb. 20, 2014), http://www.who.int/influenza/vaccines/virus/recommendations/2014_15_north/en/ [https://perma.cc/2DDK-PFXZ].

70. *Selecting Viruses for the Seasonal Influenza Vaccine*, *supra* note 69.

71. *Vaccine Effectiveness—How Well Does the Flu Vaccine Work?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/about/qa/vaccineeffect.htm> [https://perma.cc/6KJA-JQEU] (last updated Dec. 21, 2015).

72. *Id.*

outweighs its potential benefit because the benefit changes from season to season, and they have no certainty of a minimal rate of efficacy.⁷³

Although the justifications for health care workers' refusals of the flu vaccine vary, the fact remains that this group of unvaccinated health care workers exists, and for health care employers concerned with the administration of legally sound mandatory vaccination programs, this is the group of interest.

III. LEGAL IMPLICATIONS OF FACEMASK REQUIREMENTS

Because the number of states requiring mandatory influenza vaccination for their health care facilities has increased,⁷⁴ the questions concerning the legality of these programs have also increased.⁷⁵ Within the framework of mandatory vaccination programs, parties have raised a more nuanced issue concerning the violation of privacy rights through facemask requirements.⁷⁶

A. Legal Background of Mandatory Vaccination Programs

In the United States, the preservation of public health rests generally in the hands of state and local governments.⁷⁷ The states' authority to enact laws concerning public health comes from the general police powers of the states.⁷⁸ In 1905, the Supreme Court decided a seminal case on mandatory vaccinations, *Jacobson v. Massachusetts*.⁷⁹ In *Jacobson*, the city of Cambridge,

73. See Hofmann et al., *supra* note 22, at 145 (reporting that 3% to 32% of health care workers, except physicians, considered influenza vaccine to be inefficient in preventing the disease and therefore not worth having (citing Nafziger et al., *supra* note 43; Pachucki et al., *supra* note 43)).

74. See *infra* notes 87–94.

75. See, e.g., Randall et al., *supra* note 17, at 1771 (“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.”).

76. See, e.g., *id.* at 1773 (discussing a number of union cases where the parties challenged hospitals requiring unvaccinated workers to wear masks).

77. KATHLEEN S. SWENDIMAN, CONG. RESEARCH SERV., RS21414, MANDATORY VACCINATIONS: PRECEDENT AND CURRENT LAWS 1 (2009), <http://fpc.state.gov/documents/organization/132307.pdf> [<https://perma.cc/VV2Z-R8KF>].

78. *Id.*

79. 197 U.S. 11 (1905); LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 116 (2d ed. 2008) (noting that *Jacobson v. Massachusetts* is thought to be “the most important judicial decision in public health.”)

Massachusetts passed an ordinance mandating smallpox vaccination.⁸⁰ When Henning Jacobson refused to comply with the requirement, the lower court held that Jacobson was in violation of the ordinance and issued him a fine of five dollars.⁸¹ On appeal, the Supreme Court held that the state's mandatory vaccination program was constitutional.⁸² In upholding the Cambridge law, the Court stated that "the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."⁸³ The Court pointed out that while such laws were within the discretion of the states, the federal powers extended to ensure that the state laws did not "contravene the Constitution of the United States or infringe any right granted or secured by that instrument."⁸⁴ The Supreme Court's holding in *Jacobson* has withstood time. The Court has repeatedly affirmed as settled doctrine that it is within the state's police power to mandate compulsory vaccination for its citizens.⁸⁵

Although state mandatory health care-worker vaccination laws, in essence, are constitutional under the settled doctrine of *Jacobson*, mandatory vaccination programs for health care workers raise a number of collateral legal issues. At the most fundamental level, mandatory vaccination programs raise a right-to-due-process issue due to the governmental intrusion into a health care worker's life and liberty.⁸⁶ In this context, *Jacobson* established that where the common welfare is at stake, the police power of the state may limit an individual's freedom based on the state's interest in protecting the health and safety of the community.⁸⁷

80. 197 U.S. at 12–13.

81. *Id.* at 13–14.

82. *Id.* at 39.

83. *Id.* at 25.

84. *Id.*

85. GOSTIN, *supra* note 79, at 130 n.70 ("*Jacobson v. Massachusetts* . . . had settled that it is within the police power of a State to provide for compulsory vaccination. That case and others had also settled that a State may, consistently with the Federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative." (quoting *Zucht v. King*, 260 U.S. 174, 176 (1922))).

86. GOSTIN, *supra* note 79, at 135.

87. *Id.*; Randall et al., *supra* note 17, at 1772.

Following the H1N1 swine influenza outbreak in 2009,⁸⁸ multiple states enacted laws for mandatory health care worker influenza vaccinations.⁸⁹ As of September 2014, thirteen states have enacted laws that require health facilities to develop influenza-vaccination requirements for their workforces.⁹⁰

88. *The 2009 H1N1 Pandemic: Summary Highlights, April 2009–April 2010*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/h1n1flu/cdcresponse.htm> [<https://perma.cc/5FVY-CSDK>] (last updated Aug. 3, 2010). New York was the first state to enact a mandatory influenza-vaccination program in light of the H1N1 influenza outbreak. SWENDIMAN, *supra* note 77, at 4. However, the regulation was issued on an emergency basis and was later suspended because of a vaccine shortage. *Id.* at 4 n.34 (citing Press Release, Governor David A. Paterson, Governor David A. Paterson Announces Suspension of Flu Shot Mandate for Health Care Employees Due to Shortage of Vaccine (Oct. 22, 2009), https://web.archive.org/web/20101225065513/http://www.ny.gov/governor/press/press_1022094.html [<https://perma.cc/MF7X-DT43>]). This Comment will not discuss the related issue of mandatory facemasks and other protective gear during pandemic outbreaks. This issue is of particular interest in light of the recent outbreak of the Ebola virus in West Africa and the cases in the United States. See *2014 Ebola Outbreak in West Africa*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/index.html> [<https://perma.cc/35P3-EJN8>] (last updated Feb. 18, 2016); *Cases of Ebola Diagnosed in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/united-states-imported-case.html> [<https://perma.cc/9QH2-U5JM>] (last updated Dec. 16, 2014); Kate Zernike & Emma G. Fitzsimmons, *Threat of Lawsuit Could Test Maine's Quarantine Policy*, N.Y. TIMES (Oct. 29, 2014), <http://www.nytimes.com/2014/10/30/us/kaci-hickox-nurse-under-ebola-quarantine-threatens-lawsuit.html> (discussing efforts by Kaci Hickox, a nurse from Maine who went to Sierra Leone to care for Ebola patients, to oppose a mandatory quarantine, which raised a national debate regarding the individual liberties of health care workers in light of pressing public health concerns). For further discussion on mandatory vaccinations during public health emergencies, see Ben Horowitz, *A Shot in the Arm: What a Modern Approach to Jacobson v. Massachusetts Means for Mandatory Vaccinations During a Public Health Emergency*, 60 AM. U. L. REV. 1715 (2011).

89. SWENDIMAN, *supra* note 77, at 4.

90. Alabama, California, Colorado, Georgia, Illinois, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, Oklahoma, Rhode Island, and Tennessee have either mandatory or voluntary influenza-vaccination laws for hospitals. *State Immunization Laws for Healthcare Workers and Patients*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www2a.cdc.gov/vaccines/statevaccsApp/AdministrationbyVaccine.asp?Vaccinemp=Influenza> [<https://perma.cc/XM8Y-8DAT>] (last updated Nov. 19, 2014). Alabama, Colorado, New Hampshire, and Rhode Island have laws requiring hospitals to mandate influenza vaccination for hospital employees. *Id.* But see Alexandra M. Stewart & Marisa A. Cox, *State Law and Influenza Vaccination of Health Care Personnel*, 31 VACCINE 827, 828 (2013) (noting that twenty out of fifty-one jurisdictions, including the District of Columbia, have enacted laws requiring certain health care employees to develop and implement influenza-vaccination programs (citing Alexandra M. Stewart & Marisa A. Cox, *Influenza Vaccination of the Health Care Workforce: Developing a Model State Law*, GEO. WASH. U. SCH. PUB. HEALTH & HEALTH SERVS. iii (2011), <http://publichealth.gwu.edu/departments/healthpolicy/influenza/MODEL%20LAW%20REPORT.pdf> [<https://perma.cc/B2KP-F2UH>])).

Of these thirteen states, only Alabama, Colorado, New Hampshire, and Rhode Island have laws requiring hospitals to enforce mandatory influenza-vaccination programs.⁹¹ Further, only Rhode Island and Colorado specifically have facemask requirements as a part of their laws.⁹² For states that have promulgated laws in this area, lawmakers have left the language of the statutes very broad, allowing health care facilities to craft their own policies.⁹³ For example, Rhode Island, one of the jurisdictions with the strictest state laws, requires annual influenza vaccination for all health care workers but is not specific about the implementation of this mandate.⁹⁴ It only requires “[e]ach health care facility [to] develop a specific plan to require annual influenza vaccination of all health care workers . . . at no cost to the health care worker[s].”⁹⁵

Because states leave health care facilities to define the scope of their mandatory influenza-vaccination programs, many facilities allow for religious exemptions, medical exemptions, or declination forms without requiring a reason due to the legal implications of the mandatory schemes.⁹⁶ The first legal implication is that religious objections raise constitutional questions under the Free Exercise Clause of the First Amendment⁹⁷ and the Equal Protection Clause of the Fourteenth Amendment.⁹⁸ Health care workers argue that these requirements violate their right to the free exercise of religion because the Free Exercise Clause guarantees that the government may not interfere with a person’s religious beliefs.⁹⁹ However, the Supreme Court

91. *State Immunization Laws for Healthcare Workers and Patients*, *supra* note 90.

92. *Id.* at nn.235, 565 (citing R.I. GEN. LAWS ANN. § 23-17-HCW (West 2014); 6 COLO. CODE REGS. § 1011-1 (LexisNexis 2014)).

93. *See id.*

94. 14-28 R.I. CODE R. § 3.5.4 (LexisNexis 2002).

95. *Id.*

96. *See* Thomas R. Talbot et al., *Revised SHEA Position Paper: Influenza Vaccination of Healthcare Personnel*, 31 INFECTION CONTROL & HOSP. EPIDEMIOLOGY 987, 989 (2010) (discussing the efficacy of using exemptions to increase vaccination rates in major hospital systems and identifying the use of medical exemptions, religious exemptions, and signed declination forms). Exemption policies are included as possibilities in fifteen of the twenty states with mandatory vaccination laws for health care workers. Stewart & Cox, *supra* note 90, at 829.

97. U.S. CONST. amend. I.

98. U.S. CONST. amend. XIV, § 1; *see* Randall et al., *supra* note 17, at 1773; Alexandra M. Stewart, *Mandatory Vaccination of Health Care Workers*, 361 NEW ENG. J. MED. 2015, 2017 (2009). For a case discussing a mandatory flu policy in light of the freedom of expression, see *Valent v. Bd. of Review, Dep’t of Labor*, 91 A.3d 644, 646 (N.J. Super. Ct. App. Div. 2014) (“Appellant also argues the Board’s endorsement of the employer’s flu vaccination policy that contains a religious-based exemption violated her constitutionally protected right to freedom of expression under the First Amendment of the Constitution of the United States.”).

99. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion.”).

already has determined the constitutionality of mandatory vaccination programs in the context of mandatory vaccinations for children in schools and has found the mandate constitutional.¹⁰⁰ Therefore, the general mandatory requirements in hospitals do not violate the First Amendment because the Supreme Court has already found that identical mandatory programs are constitutional in the schoolchildren cases.¹⁰¹ Likewise, health care workers argue that the mandatory vaccinations violate their right to autonomy and their right to refuse medical treatment under the Equal Protection Clause.¹⁰² However, the same analysis that applies to schoolchildren vaccination also renders this argument ineffective.¹⁰³

Mandatory vaccination laws are also subject to federal regulations, such as Title VII of the Civil Rights Act of 1964 (Title VII).¹⁰⁴ Wronged parties can raise religious objections under Title VII in the context of employee religious discrimination claims.¹⁰⁵ Title VII defines religion as “all aspects of religious observance and practice, as well as belief.”¹⁰⁶ Although Title VII requires that an employee have a sincere and bona fide religious belief as opposed to a purely personal preference, religious beliefs protected by Title VII need not be “acceptable, logical, consistent, or comprehensible to others.”¹⁰⁷ On March 5, 2012, the Equal Employment Opportunity

100. See LeFever, *supra* note 45, at 1061 & n.123 (citing Emp’t Div., Dep’t of Human Res. of Oregon v. Smith, 494 U.S. 872, 901 (1990)) (“[M]andatory school immunization laws are neutral laws of general applicability and clearly do not violate the Free Exercise Clause under *Smith*. . .”).

101. See *id.*

102. See *id.* at 1064 (explaining that due to the strong interest in a child’s right to health and safety and the support for compulsory immunization, plaintiffs for children have a difficult time meeting the burden to show that they have not been afforded equal protection).

103. See *id.* at 1064 (“[A] proper equal protection analysis should require states to provide compelling reasons for denying immunized children the full protection against disease that school immunizations laws are intended to provide. Due to the overriding interest in the child’s right to health and safety, and the overwhelming support for compulsory immunization, it is unlikely the state could meet such a burden.”).

104. See Randall et al., *supra* note 17, at 1773–74.

105. Edwards v. Elmhurst Hosp. Ctr., No. 11 CV 4693 RRM LB, 2013 WL 839535, at *3 (E.D.N.Y. Feb. 15, 2013); see Drew D. Hintze, *Mandatory Influenza Vaccination Policies in Colorado: Are Healthcare Employees with Religious Conflicts Exempt?*, 90 DENV. U. L. REV. ONLINE 27, 36 (2013), http://static1.1.sqspcdn.com/static/f/276323/22365436/1365265051350/Hintze_MandatoryVaccination_Final_Formatted.pdf?token=UzOjf8Lj5qEkm93sbccn3yiSis8%3D [<https://perma.cc/3G25-CCGD>].

106. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified as amended at 42 U.S.C. §2000e(j) (2014)).

107. Thomas v. Review Bd. of the Ind. Empl. Sec. Div., 450 U.S. 707, 714 (1981).

Commission (EEOC) issued an informal discussion letter from its legal counsel wherein the commission cautioned health care employers that mandatory influenza vaccine programs create complicated legal issues that must comply with Title VII.¹⁰⁸ However, religious accommodations are only required if there is no undue hardship on the employer.¹⁰⁹

Further, the EEOC has addressed mandatory infection-control practices for health care workers with disabilities under the ADA.¹¹⁰ The EEOC states that ADA-covered employers must provide exemptions for employees with ADA disabilities that may prevent the employee from receiving the influenza vaccine.¹¹¹ The EEOC notes that this type of exemption would be a reasonable accommodation barring undue hardship—significant administrative difficulty or expense—as opposed to the lower undue hardship standard under Title VII—more than *de minimis* cost.¹¹² The EEOC encourages ADA-covered employers to consider encouraging employees to get the influenza vaccine rather than requiring them to receive it.¹¹³

Lastly, one of the most feasible legal objections to mandatory influenza vaccinations for health care workers exists under the scope of collective bargaining agreements.¹¹⁴ In general, employers may create comply-or-go policies because of the prevailing *employment at will* rule that applies to the vast majority of employer–employee relationships.¹¹⁵ With some important exceptions, employers are free to fire employees at any time and without notice, just as employees can quit without explanation or notice.¹¹⁶ However, many health care workers exist under different employment

108. Letter from Peggy R. Mastronianni, Legal Counsel to the U.S. Equal Emp't Opportunity Comm'n, Title VII: Religious Accommodation (Mar. 5, 2012), http://www.eeoc.gov/eeoc/foia/letters/2012/religious_accommodation.html [<https://perma.cc/6G73-FR34>]. In addition, an employer covered by Title VII may enact facemask requirements and other additional infection-control measures for their exempt employees for legitimate, nondiscriminatory, and nonretaliatory reasons. *Id.* However, health care workers may feel coerced into getting a vaccination they do not want because they do not want to be required to wear a mask all the time. See Gounley, *supra* note 1. Employers may be in violation of Title VII by requiring health care workers, who receive religious exemptions from the vaccination, to wear facemasks. See Mastronianni, *supra*.

109. See EEOC Compl. Man., Section 12: Religious Discrimination 1–2, 56–65 (2008), <http://www.eeoc.gov/policy/docs/religion.pdf> [<https://perma.cc/MP4D-TY52>].

110. See *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/facts/pandemic_flu.html [<https://perma.cc/G7BC-MDKT>] (last modified Oct. 9, 2009).

111. *Id.*

112. *Id.* n.36 (quoting EEOC Compl. Man., *supra* note 109, at 56–65).

113. *Id.*

114. See Stewart et al., *supra* note 20, at 344–46.

115. See Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118 (1976).

116. *Id.* at 126 n.69 (quoting H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 283 (2d ed. 1886)).

arrangements. For example, courts analyze contracting employment requirements for union employers under a separate employment doctrine for collective bargaining agreements and union contracting.¹¹⁷ Union contracts are one of the most litigated issues to date under the rise of mandatory vaccination programs because a number of claims under collective bargaining agreements have already reached decisions in federal court.¹¹⁸ Thus, unions are bringing claims for collective bargaining violations based on these appellate decisions.¹¹⁹

Notwithstanding the legal issues surrounding mandatory vaccination programs themselves, facemask requirements within these mandatory programs are an independent source of legal complications. There are two ways that employers' facemask requirements can implicate privacy issues in mandatory influenza-vaccination programs. First, when employers require employees who have declined the vaccination to wear facemasks, even if the primary purpose is infection control, the mask identifies the unvaccinated health care workers from their vaccinated coworkers.¹²⁰ This disclosure can happen in two conceivable ways. The act of wearing facemasks can force health care workers to explain to their patients why they are wearing the facemask because patients are often startled when their caretaker is wearing a facemask.¹²¹ Also, other health care workers might be able to recognize which of their peers are unvaccinated by determining when certain health care workers are wearing facemasks outside of ordinary medical situations.¹²²

Second, many health care employers have further methods in place for publicly indicating who has not received the shot, including color-coded

117. See Randall et al., *supra* note 17, at 1773.

118. See, e.g., *Virginia Mason Hosp. v. Wash. State Nurses Ass'n*, 511 F.3d 908, 917 (9th Cir. 2007); *SEIU, Local 121RN v. Healthcare Corp. of Am.*, No. 09-cv-05065 (N.D. Cal. Apr. 8, 2011); see also Randall, Curran & Omer, *supra* note 17, at 1773 (discussing the effect of union contracts on new conditions of employment).

119. See Felice J. Freyer, *Brigham and Women's Nurses Sue Over Flu Shot Mandate*, BOS. GLOBE (Sept. 25, 2014), <http://www.bostonglobe.com/metro/2014/09/24/nurses-union-sues-block-proposed-flu-shot-mandate-brigham-and-women-hospital/SQBXdxd1OQwTie5Fyg1d1J/story.html> (reporting that the Massachusetts Nurses Association sued Brigham and Women's Hospital over a mandatory flu vaccination program).

120. See Transcript of Proceedings Before the Honorable Jeremy Fogel at 15–22, *SEIU, Local 121RN v. Healthcare Corp. of Am.*, No. 09-cv-05065-JF (N.D. Cal. Apr. 8, 2011).

121. Gounley, *supra* note 1.

122. See Transcript of Proceedings Before the Honorable Jeremy Fogel, *supra* note 120.

stickers on badges that indicate that workers wearing facemasks are unvaccinated.¹²³ Placing such information in plain view publicly discloses that employees wearing certain badges paired with facemasks are unvaccinated. Employers argue that badges and other identifying material are necessary for hospital management to identify which employees have not received the vaccine and require masks.¹²⁴ The privacy argument is that patients and peer health care workers should not be able to discern that a certain health care worker has not received the influenza vaccine because the refusal implicates personal information that is private to the exempted health care worker.

*B. Privacy Rights of Health Care Workers Violated by
Facemask Requirements*

Although the courts have not ruled substantively on the issue of facemask requirements as a violation of health care worker privacy, there have been a number of cases where parties have raised this issue. For example, in *SEIU, Local 121RN v. Healthcare Corp. of America*, a district court in California expressed disfavor for the identifying masks and badges used in the defendant hospitals' mandatory influenza-vaccination programs.¹²⁵ In *SEIU*, a nurses' union sought a temporary restraining order (TRO) to maintain the status quo pending arbitration regarding mandatory vaccination programs at five California hospitals.¹²⁶ In a motion hearing on the TRO, the court specifically asked the parties to address the issue of identifying materials stigmatizing health care workers.¹²⁷ In its order, the court stated that the identification policies had the "collateral and unnecessary effect of calling the employees' status to the attention of patients and the public."¹²⁸ The order further found that the hospitals needed to implement a new policy that better served the "management's legitimate interest" in identifying unvaccinated employees, which, at the same time, did not "call undue and inappropriate attention to an individual employee's [exempt] status."¹²⁹ Although the court denied the union's application for injunctive relief, the

123. *Id.* at 16.

124. *Id.* at 20.

125. *Id.* at 11, 22.

126. Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order and for Injunctive Relief Pending Arbitration at 1, *SEIU, Local 121RN v. Healthcare Corp. of Am.*, No. 09-cv-05065-JF (N.D. Cal. Apr. 8, 2011).

127. See Transcript of Proceedings Before the Honorable Jeremy Fogel, *supra* note 120.

128. Order Denying Conditionally Plaintiffs' Motion for Injunctive Relief Pending Arbitration at 5, *SEIU, Local 121RN v. Healthcare Corp. of Am.*, No. 09-cv-05065-JF (N.D. Cal. Apr. 8, 2011).

129. *Id.*

court also ordered the hospitals to “eliminate any stigmatizing procedures associated with the new vaccination policy.”¹³⁰

The following legal theories frame the privacy interests of health care workers who decline vaccination: (1) the common law right to privacy; (2) the federal constitutional right to privacy; and (3) a statutory right to privacy.¹³¹

1. Common Law Right to Privacy

State courts had recognized a common law right to privacy long before the Supreme Court even inferred that it was a constitutional right.¹³² Many jurisdictions recognize a common law right to privacy under a tort theory of liability.¹³³ Generally, a right of privacy tort action provides a

130. *Id.* at 6.

131. Health care workers who choose not to be immunized for various reasons face inquiry from their peers and patients in a similar way to how the public views employees with HIV/AIDS in the workplace. See Rose Knotts & J. Lynn Johnson, *AIDS in the Workplace: The Pandemic Firms Want to Ignore*, 36 BUS. HORIZONS July–Aug. 1993, at 5, 5. There may be legal analogies that can be drawn between how HIV/AIDS disclosures are treated in the workplace and the disclosure of a health care worker’s vaccination status. Most states have special legislation regarding the disclosure of HIV/AIDS status specifically. See THOMSON REUTERS, 50 STATE STATUTORY SURVEYS: INSURANCE: HEALTH: DISCLOSURE OF HIV/AIDS STATUS (Dec. 2014), Westlaw 0110 SURVEYS 24. Some jurisdictions have specific legislation regarding the required disclosure of HIV/AIDS status of health care workers. *Id.* A key distinction between HIV/AIDS disclosures and the facemask requirement in mandatory influenza-vaccination policies for health care workers is that there is no true disclosure of vaccination status to a third party. In other words, by requiring exempt health care workers to wear facemasks, the employer is not explicitly *telling* a third party about the health care worker’s vaccination status. An important element of the HIV/AIDS statutes involves the nature of the disclosure that occurs between an employer and another party. This analogy may be an interesting area of further inquiry.

132. See JOHN T. SOMA & STEPHEN D. RYNERSON, *PRIVACY LAW IN A NUTSHELL* 59 (2008). The common law right to privacy arose out of actions for trespass to remedy privacy invasions. See Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U.L. REV. 703, 706 (1990). Actual legal remedies for breach of privacy arose as early as 1892. *Id.* at 706 & n.25 (citing *Moore v. N.Y. Elevated R. Co.*, 29 N.E. 997, 998 (N.Y. 1892)).

133. RESTATEMENT (SECOND) OF TORTS app. § 652A reporter’s note (AM. LAW INST. 1981) (noting that a tort action for invasion of the right of privacy is recognized in Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, and West Virginia).

remedy for four categories of wrongs or types of privacy invasion: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the other's name or likeness; (3) unreasonable publicity given to the other's private life; and (4) publicity that unreasonably places the other in a false light before the public.¹³⁴ Masking and identification policies only appear to implicate the *intrusion-upon-seclusion* and *publicity-given-to-private-life* forms of privacy tort.¹³⁵ However, health care workers cannot allege a privacy tort solely based on the masking requirement.¹³⁶ When patients and peers ask the health care worker about a mask, the health care worker is the one who discloses private information, even if they do so because they feel compelled to.¹³⁷ Therefore, the employee must raise these privacy torts on facts directly pertaining to the identifying material or other actions taken by hospital administrators and not the employee's unilateral actions.¹³⁸

134. RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW. INST. 1977).

135. First, under the intrusion-upon-seclusion form of privacy tort, “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” *Id.* § 652B. Examples of the intrusion-upon-seclusion tort include someone forcing his way into another's room, overseeing or overhearing another's private affairs, looking into another's windows with binoculars, and opening another's private mail. *Id.* Second, under the appropriation-of-name-or-likeness form of privacy tort, “[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.” *Id.* § 652C. This privacy tort is commonly violated when one uses another's name and likeness to advertise a product. *Id.* Third, under the publicity-given-to-private-life form of privacy tort:

[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.

Id. § 652D. Fourth, under the publicity-placing-person-in-false-light form of privacy tort:

[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Id. § 652E. The appropriation-of-name-or-likeness form does not apply, and health care workers cannot raise publicity-placing-person-in-false-light tort claims because the disclosure of vaccination status is presumably a true statement. *See id.* §§ 652C, 652E.

136. *See* Transcript of Proceedings Before the Honorable Jeremy Fogel, *supra* note 120.

137. *See* Transcript of Proceedings Before the Honorable Jeremy Fogel, *supra* note 120.

138. *See supra* note 136 and accompanying text.

First, health care workers who feel they must reveal their reasons for declining the influenza vaccination may have a state law cause of action for invasion of privacy for intrusion upon seclusion. In *Roe v. Cheyenne Mountain Conference Resort*, an employee sued her employer for violation of her right to privacy after her employer implemented a policy in which the employee had to disclose her prescription drug use, submit to random drug testing, and refrain from nonprescription drug use.¹³⁹ The employee brought a state law invasion of privacy claim for intrusion upon seclusion.¹⁴⁰ The Tenth Circuit vacated the lower court's decision rejecting the employee's privacy claim, finding that the intrusion-on-seclusion claim did not depend on publicity of private matters.¹⁴¹ Instead, the Tenth Circuit found that the lower court should uphold the employee's privacy claim on remand because the employee would feel embarrassment in the disclosures to her supervisors, and this interaction between only the employee and her employer, as opposed to the public, was sufficient for an intrusion upon seclusion claim.¹⁴²

Roe gives hope to health care workers who bring claims for breach of privacy resulting from facemask and other identification policies. Without the need to show a disclosure to a patient or a colleague, a health care worker may be able to bring a suit on the basis that their employer made the employee's confidential reasons for declining the mandatory flu shot open to the employer through the structure of the policy itself.¹⁴³ The exemption policies of many existing mandatory vaccination programs require specific disclosure of the reason behind the exemption.¹⁴⁴ This makes sense because the administration must determine whether the reason calls for an exemption.¹⁴⁵ However, the specific disclosure of the reason may cause embarrassment to the employee, even if the administrators are the only people finding out, similar to the situation in *Roe*.¹⁴⁶

139. 124 F.3d 1221, 1226 (10th Cir. 1997).

140. *Id.* at 1236.

141. *Id.*

142. *See id.* at 1236–37 (“[P]laintiff has raised a substantial issue with the possibility that Colorado would uphold an invasion of privacy by intrusion on seclusion . . .”).

143. *See id.* at 1236 (discussing that the plaintiff did not need to allege that the company's policy published the plaintiff's personal information).

144. *See* Talbot et al., *supra* note 96, at 991 (discussing mandatory influenza-vaccination programs that require reasons for refusal in declination forms).

145. *See id.* (suggesting that requiring reasons for refusal would lead to face-to-face meetings where health care workers can review their reasons).

146. *See Roe*, 124 F.3d at 1236.

Second, health care employees can hold health care employers liable for invasion of privacy for publicity given to private life if employers make the vaccination statuses of exempted health care workers publicly known through identifying badges, stickers, and wall postings. To state a claim for invasion of privacy pursuant to publicity given to private life, a plaintiff must plead and prove that: (1) “publicity was given to the disclosure of private facts”; (2) “the facts were private, and not public, facts”; and (3) “the matter made public was such as to be highly offensive to a reasonable person.”¹⁴⁷ At first glance, a claim under the publicity-given-to-private-life form of privacy tort appears to be a more difficult standard for health care workers to meet because of the additional publicity requirement.¹⁴⁸ However, under the law of some jurisdictions, such as Colorado, the requirement is not prohibitive to health care workers’ claims in the context of vaccination-status disclosure.¹⁴⁹ In general, the publicity requirement obliges plaintiffs to allege that the offender has made a private matter available to the public *at large*, and it is not enough that the offender communicated a private fact to a single person or even a small number of persons.¹⁵⁰

Although the Second Restatement of Torts advises that the offender must communicate the information to the public at large—instead of to a small group—in order to violate the law, some courts have applied the publicity requirement more broadly.¹⁵¹ Some jurisdictions take the position that plaintiffs may satisfy the public-disclosure requirement with proof that a plaintiff has a special relationship with the *public* to whom the employer reveals the information because the disclosure may be just as devastating to the person even though the disclosure was to a limited number of people.¹⁵² In *Miller v. Motorola*, the court found that an employee’s allegation that her employer disclosed the employee’s medical condition to her fellow employees was enough to satisfy the publicity requirement within the publicity-given-to-private-life privacy tort.¹⁵³ Therefore, the disclosure of a health care worker’s vaccination status to their peers or

147. *E.g.*, *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 902 (Ill. App. Ct. 1990) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 856 (4th ed. 1971)).

148. RESTATEMENT (SECOND) OF TORTS, *supra* note 134, at § 652D.

149. *See Roe*, 124 F.3d at 1236.

150. RESTATEMENT (SECOND) OF TORTS, *supra* note 134, at § 652D cmt. a.

151. *Miller*, 560 N.E.2d at 903 (citing *McSurely v. McClellan*, 753 F.2d 88, 112 (D.C. Cir. 1985)).

152. *Id.*; *Beaumont v. Brown*, 257 N.W.2d 522, 531 (Mich. 1977), *superseded by statute*, Freedom of Information Act, MICH. COMP. LAWS § 15.231 (West, Westlaw through P.A. 2016, No. 24 of the 2016 Reg. Sess.) *as recognized in* *Bradley v. Saranac Bd. of Educ.*, 565 N.W.2d 650, 657–58 (1997).

153. *Miller*, 560 N.E.2d at 903.

patients could satisfy the publicity requirement because, although the disclosure is not made to a large number of people, it is to a group with whom the health care worker has an arguably *special relationship*.¹⁵⁴

Yet, tort actions for breach of privacy may be a difficult avenue of relief for health care workers because of the number of defenses and privileges that exist for both public and private employers under tort theories of liability.¹⁵⁵ For example, defenses for privileged communications and immunities for certain employers may protect employers from private tort actions.¹⁵⁶

2. Federal Constitutional Right to Privacy

Although the Constitution does not mention the right to privacy, over the past six decades, the Supreme Court has inferred a right to privacy under the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution.¹⁵⁷ The Supreme Court first recognized a constitutional right to privacy in *Griswold v. Connecticut*, a case involving a state statute prohibiting the use of contraceptives.¹⁵⁸ The Court held that a right to marital privacy existed in a penumbra emanating from several constitutional protections.¹⁵⁹ Later, in *Roe v. Wade*, the Court further articulated that a right to personal privacy and certain zones of privacy were present in the Constitution and that this privacy right guarantees only fundamental personal rights.¹⁶⁰

154. See, e.g., *id.* (“We adopt the position of the above authorities that the public disclosure requirement may be satisfied by proof that the plaintiff has a special relationship with the ‘public’ to whom the information is disclosed.”).

155. RESTATEMENT (SECOND) OF TORTS, *supra* note 134, at §§ 652F–G.

156. *Id.*; 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 581.

157. SOMA & RYNERSON, *supra* note 132, at 58–59.

158. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965); see SOMA & RYNERSON, *supra* note 132, at 59.

159. *Griswold*, 381 U.S. at 481–84 (citing U.S. CONST. amends. I, III, IV, V, IX, XIV).

160. *Roe v. Wade*, 410 U.S. 113, 152–153 (1973) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold*, 381 U.S. at 484–85; *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *Boyd v. United States*, 116 U.S. 616 (1886)).

The Court then handled the right to privacy over information in *Whalen v. Roe*.¹⁶¹ In *Whalen*, physicians and patients challenged the constitutionality of a New York law collecting personal prescription information regarding certain pharmaceutical drugs.¹⁶² The Court clarified that the constitutional right to privacy concerned at least two distinct interests: (1) the individual interest in “avoiding disclosure of personal matters”; and (2) “independence in making certain kinds of important decisions.”¹⁶³ Although the Court ultimately held that the patient identification requirements in *Whalen* did not violate either interest, the Court did state that the Fourteenth Amendment protected these interests.¹⁶⁴

Nixon v. Administrator of General Services was another case in which the Court faced the issue of the constitutional right to privacy with regard to personal information.¹⁶⁵ *Nixon*, however, dealt with privacy rights under the Fourth Amendment.¹⁶⁶ Here, the Court found that it had to weigh the right to privacy claims against the public interest in subjecting President Nixon’s presidential materials to archival screening.¹⁶⁷ Finally, the Supreme Court recently addressed the issue of informational privacy rights in *National Aeronautics & Space Administration v. Nelson*.¹⁶⁸ In *Nelson*, the Court held that governmental background checks did not violate the constitutional rights of job applicants because of the government’s interest in employing qualified applicants as well as the protections against public dissemination that the government has in place.¹⁶⁹ However, more importantly, the Court referenced a constitutional right to informational privacy.¹⁷⁰

Courts have yet to adjudicate the specific case of a health care worker’s claim that a facemask requirement resulted in a constitutional violation of privacy. However, at least four circuits have considered cases regarding the constitutional right to privacy in personal medical information.¹⁷¹ In

161. *Whalen v. Roe*, 429 U.S. 589 (1977).

162. *Id.* at 595.

163. *Id.* at 599–600 (citations omitted).

164. *Id.* at 603–04.

165. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977).

166. *See id.* at 460.

167. *See id.* at 458 (finding that President Nixon’s privacy interest was weaker because it dealt with official conduct of his presidency) (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Camara v. Mun. Court*, 387 U.S. 523, 534–39 (1967)).

168. *Nat’l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134 (2011).

169. *Id.* at 159 (citing *Whalen*, 429 U.S. at 605).

170. *Id.* at 138 (“We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*.”).

171. *E.g.*, *Seaton v. Mayberg*, 610 F.3d 530, 535 (9th Cir. 2010); *Doe v. Delie*, 257 F.3d 309, 312 (3d Cir. 2001); *Herring v. Keenan*, 218 F.3d 1171, 1173 (10th Cir. 2000); *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999).

Doe v. Delie, the Third Circuit found that a person's constitutional right to privacy in his or her medical information exists in prison.¹⁷² The plaintiff in *Doe* believed that the prison medical personnel violated his privacy when they revealed the plaintiff's HIV-positive status to other hospital staff.¹⁷³ While a person's HIV-positive status in a prison may seem unrelated to the issue of health care workers and facemask requirements, the two scenarios share commonalities that provide insight into how a court may analyze the constitutional privacy rights of health care workers as compared to those of prison inmates.

First, the disclosure that takes place in a prison is very similar to how a hospital could disclose a health care worker's exemption reason. In *Doe*, the disclosure occurred because of specific procedures that the prison administration had in place.¹⁷⁴ For example, when prison personnel took the plaintiff to medical appointments, "[medical] staff informed the escorting officers of [the plaintiff's] medical condition."¹⁷⁵ Further, "[d]uring physician visits, [medical] staff kept the door to the clinic room open, allowing officers, inmates, and guards in the area to see and hear [the plaintiff] and the treating physician."¹⁷⁶ Lastly, "while administering medication, nurses announced his medication loudly enough for others to hear, allowing inmates to infer [the plaintiff's] condition."¹⁷⁷ This procedural system of disclosure closely matches the way a health care employer's mandatory vaccination program can reveal a health care worker's reason for declining the flu vaccination.¹⁷⁸ A health care employer does not openly tell other people an unvaccinated health care worker's private information. However, the manner in which a hospital administers its mandatory vaccination program makes it possible for a health care worker's coworkers and patients to infer the reason that a health care worker has not received vaccination.¹⁷⁹ In the same manner that inmates and guards inferred from the way the plaintiff in *Doe* was treated for his HIV-positive status, the patients and other hospital workers in a hospital can determine from a health care worker's mask or identifying

172. *Doe*, 257 F.3d at 315–17.

173. *Id.* at 311–12.

174. *Id.*

175. *Id.* at 311.

176. *Id.* at 311–12.

177. *Id.* at 312.

178. *See supra* notes 120–24 and accompanying text.

179. *See supra* notes 120–24 and accompanying text.

badge that the health care worker either has a medical condition or a personal reason for not getting vaccinated.¹⁸⁰

Second, an inmate in a prison is analogous to a health care worker in a hospital. An inmate has restricted liberties because of his or her incarceration.¹⁸¹ While it is hard to liken a health care worker's situation to an inmate's incarceration, health care workers' unique position in public health places certain restrictions on their liberties.¹⁸² Health care workers often have to limit their civil liberties for the good of public health and in extreme circumstances, such as quarantines for emergencies, even limit their physical freedom.¹⁸³ Because inmates and health care workers share similarities in the dissemination of private information and restrictions on civil liberties, the way the Third Circuit treated the constitutional right to privacy in medical information for inmates may serve as a springboard for a court to find that health care workers have a constitutional right to privacy in their reasons for refusing the flu vaccine.

The Third Circuit in *Doe* held that a person's constitutional right to privacy in their medical information exists in prison because: (1) "the privacy interest in information regarding one's HIV status is particularly strong because of the stigma, potential for harassment, and risk of . . . harm"; (2) information about one's HIV-positive status is very personal information; and (3) "a prisoner's right to privacy in this medical information is not fundamentally inconsistent with incarceration."¹⁸⁴ Other courts can successfully apply the *Doe* court's reasoning to the case of unvaccinated health care workers. First, health care workers who refuse the vaccination face stigma.¹⁸⁵ Second, from situations like Ms. Brock's, it appears that the information behind refusing a vaccination can be deeply personal for the individual.¹⁸⁶ The third prong may be more difficult for plaintiffs to argue because the administration of a health care facility involves many unique public health considerations. However, health care workers could argue that their privacy interest in the reasons behind vaccination refusal

180. See *Doe*, 257 F.3d at 312.

181. See *id.* at 317 (discussing how the plaintiff claimed he was always escorted by guards).

182. See *supra* notes 26–27 and accompanying text.

183. Zernike & Fitzsimmons, *supra* note 88 (discussing efforts by Kaci Hickox, a nurse from Maine who went to Sierra Leone to care for Ebola patients, to oppose a mandatory quarantine upon her return to the U.S., which raised a national debate regarding the individual liberties of health care workers in light of pressing public health concerns).

184. *Doe*, 257 F.3d at 315, 317 (internal quotation omitted) (quoting *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1140 (3d Cir. 1995)).

185. See *infra* notes 263–65 and accompanying text.

186. Gounley, *supra* note 1.

is not “fundamentally inconsistent” with the administration of public health.¹⁸⁷

It is within this legal framework that health care workers who do not wish to reveal their personal choices for opting out of mandatory influenza-vaccination programs may attempt to challenge the constitutionality of state regulations.¹⁸⁸

3. Statutory Right to Privacy: Health Insurance Portability and Accountability Act of 1996 (HIPAA)

Congress originally passed HIPAA, the first comprehensive federal rules on health privacy, with the primary purpose of making health insurance coverage more continuous.¹⁸⁹ To comply with this purpose, in 2001, the U.S. Department of Health and Human Services (HHS) issued the HIPAA Privacy Rule, which was the first major federal regulation protecting the disclosure of medical records generated or received by health care providers, health care clearinghouses, and health plans.¹⁹⁰ Under HIPAA, *disclosure* means the “release, transfer, provision of access to, or divulging in any manner of information outside the entity holding the information.”¹⁹¹

Some plaintiffs argue that hospitals may violate HIPAA by requiring health care workers who are exempt from the vaccine to wear facemasks

187. See *Doe*, 257 F.3d at 317.

188. Certain states have constitutional privacy protections that provide for even more rights than the federal Constitution, with rights to privacy explicitly included in their state constitutions. See DANIEL J. SOLOVE & MARC ROTENBERG, INFORMATION PRIVACY LAW 21 (2003). For example, the California Constitution states that “[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” CAL. CONST. art. I, § 1. Further, California courts have held that this constitutional provision creates a right of action against private employers as well as public employers. SOLOVE & ROTENBERG, *supra* (citing *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994)). Therefore, health care workers in California can sue their employers for a violation of their state constitutional rights to privacy. See CAL. CONST. art. I, § 1. Other states that expressly include a right to privacy in their constitutions include Alaska, Arizona, Florida, Montana, Hawaii, Illinois, Louisiana, South Carolina, and Washington. ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; FLA. CONST. art. I, § 23; MONT. CONST. art. II, § 10; HAW. CONST. art. I, § 6; ILL. CONST. art. I, §§ 6, 12; LA. CONST. art. I, § 5; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

189. Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996); SOLOVE & ROTENBERG, *supra* note 188, at 210.

190. 87 AM. JUR. 3D *Confidentiality of Medical and Other Treatment Records* § 259 (2006).

191. 45 C.F.R. § 160.103 (2014).

or unique badges.¹⁹² Outside of the courts, some practitioners and scholars have concluded that HIPAA does not apply to the disclosure of vaccination status by the facemask and badge requirements.¹⁹³ Some of these practitioners argue that, because HIPAA only controls the disclosure of information by health plans or providers and not disclosure by individuals, it does not apply when health care workers themselves disclose their vaccination status.¹⁹⁴ Others contend that HIPAA does not apply to vaccination statuses because vaccination records created and maintained by employers are not protected health information (PHI) covered by the statute.¹⁹⁵ Some health care employers take the cursory dismissal of HIPAA on its face.¹⁹⁶ However, parties have not fleshed out the privacy question under HIPAA and identical state privacy protections in the courts. In the following cases, although the courts discuss the HIPAA issue without any substantive ruling on the privacy of health care workers, the direction of some courts demonstrates that there is room for employees to successfully raise this argument.¹⁹⁷

192. See Randall et al., *supra* note 17, at 1774.

193. See *id.*; Tyler Wilkinson, *Best Medicine for the Flu: Employer-Mandated Flu Shots?*, WIS. EMP. L. LETTER, Mar. 2013, at 6, WESTLAW, 22 No. 3 Wis. Emp. L. Letter 6.

194. See Randall et al., *supra* note 17, at 1774 & n.73 (“[HIPAA] controls only the disclosure of information by health plans or providers, not by individuals; it does not apply when employees report their own health information, such as whether they have been vaccinated. Therefore, a legal challenge of mandatory vaccination on these grounds would likely be unsuccessful.” (citing *Employers & Health Information in the Workplace*, HHS.GOV, <http://www.hhs.gov/hipaa/for-individuals/employers-health-information-workplace/index.html> [<https://perma.cc/VZK5-PQHJ>] (last visited Mar. 8, 2016)) (footnote omitted).

195. Wilkinson, *supra* note 193.

196. See *Questions & Answers About the 2014–2015 Flu Vaccination Program*, MHEALTHY OCCUPATIONAL HEALTH SERVICES, <http://hr.umich.edu/mhealthy/programs/occupational/ohs/services/influenza/faq.html> [<https://web.archive.org/web/20150510171230/http://hr.umich.edu/mhealthy/programs/occupational/ohs/services/influenza/faq.html>]. University of Michigan declares that its identifying badges are not in violation of HIPAA. *Id.* However, University of Michigan’s authority for this assertion is lacking. A closer look at the OSHA and CDC authority the University of Michigan cites to reveals a mere interpretation letter from OSHA, stating that “although OSHA does not specifically require employees to take the vaccines, an employer may do so,” a general OSHA factsheet regarding the seasonal flu, and a link to a CDC webpage regarding vaccination resources for health professionals. Interpretation letter from Jordan Barab, Acting Assistant Secretary, OSHA, to the Honorable Marcy Kaptur, (Nov. 9, 2009), www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=27284 [<https://perma.cc/KF5B-H3RV>]; *OSHA Fact Sheet: Seasonal Influenza Vaccination—Important Protection for Healthcare Workers*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (Nov. 2007), www.osha.gov/Publications/seasonal-flu-factsheet.pdf [<https://perma.cc/C55P-HJB3>]; *Seasonal Influenza Vaccination Resources for Health Professionals*, CTRS. FOR DISEASE CONTROL & PREVENTION, www.cdc.gov/flu/professionals/vaccination/index.htm [<https://perma.cc/QM3J-23Z6>] (last updated Oct. 22, 2015). Nowhere in the authority are HIPAA or privacy violations mentioned. See *Questions & Answers About the 2014–2015 Flu Vaccination Program*, *supra*.

197. See Memorandum of Points & Authorities in Support of Petitioner/Plaintiff’s Ex Parte Application for a Temporary Restraining Order & Order to Show Cause Re:

In *United Nurses of Children's Hospital v. Rady Children's Hospital*, a nurses' union sought injunctive relief from the hospital's new influenza policy, which included a mandatory facemask and badge policy for unvaccinated workers.¹⁹⁸ One argument by the union was that the facemask and colored-badge policy violated HIPAA by publicly identifying the health care workers who had chosen to refuse the vaccination.¹⁹⁹ Conversely, the hospital argued that its facemask requirement did not violate HIPAA because (1) the policy did not compel the disclosure of PHI; (2) HIPAA allows hospitals to disseminate PHI as part of legitimate hospital operations; (3) the hospital is not a covered entity under HIPAA; and (4) there is no private right of action under HIPAA.²⁰⁰ The union replied that the hospital was applying "form over substance" by not acknowledging that the masks and colored badges were identifiable information in physical form.²⁰¹ The court discussed the privacy matter under HIPAA and the equivalent California statute at oral arguments.²⁰² The union cited *SEIU, Local 121RN* as support for its contention that the stigmatizing effect of the facemask requirement created significant harm to the health care workers.²⁰³ The hospital countered that the policy did not violate HIPAA and did not create irreparable harm.²⁰⁴ If anything, the hospital argued, a child dying from a virus contracted from

Preliminary Injunction at 1, 5, *United Nurses of Children's Hosp. v. Rady Children's Hosp.* San Diego, No. 09-cv-02633-MMA-CAB (S.D. Cal. Mar. 22, 2010); Defendant's Opposition to Plaintiff's Request for a Preliminary Injunction Pending Arbitration at 17–21, *United Nurses of Children's Hosp. v. Rady Children's Hosp.* San Diego, No. 09-cv-02633-MMA-CAB (S.D. Cal. Mar. 22, 2010); Plaintiff's Reply to Defendant's Opposition to Plaintiff's Ex Parte Application for a Temporary Restraining Order & Order to Show Cause Re: Preliminary Injunction at 9–10, *United Nurses of Children's Hosp. v. Rady Children's Hosp.* San Diego, No. 09-cv-02633-MMA-CAB (S.D. Cal. Mar. 22, 2010); Transcript of Oral Argument at 20–26, *United Nurses of Children's Hosp. v. Rady Children's Hosp.* San Diego, No. 09-cv-02633-MMA-CAB (S.D. Cal. Mar. 22, 2010).

198. Memorandum of Points & Authorities in Support of Petitioner/Plaintiff's Ex Parte Application for a Temporary Restraining Order & Order to Show Cause Re: Preliminary Injunction, *supra* note 197.

199. *Id.* at 11.

200. Defendant's Opposition to Plaintiff's Request for a Preliminary Injunction Pending Arbitration, *supra* note 197.

201. Plaintiff's Reply to Defendant's Opposition to Plaintiff's Ex Parte Application for a Temporary Restraining Order & Order to Show Cause Re: Preliminary Injunction, *supra* note 197.

202. Transcript of Oral Argument, *supra* note 197.

203. *Id.* at 7–8 (citing *SEIU, Local 121RN v. Healthcare Corp. of Am.*, No. 09-cv-05065-JF (N.D. Cal. Apr. 8, 2011)).

204. *Id.* at 20–21.

a health care worker not wearing a mask was a much greater harm.²⁰⁵ Although the court ultimately denied the union's motion for injunction,²⁰⁶ it did not close the case on claims for violation of HIPAA.²⁰⁷ The court analyzed the privacy claim under the framework of the application for preliminary injunction.²⁰⁸ The court's order gave no substantive ruling on the merits of the privacy claims; it only ruled that the facemask and badge requirement did not cause irreparable injury in this case to the point where the injunction was necessary.²⁰⁹

In another union dispute, *SEIU Healthcare Employees Union, District 1199 v. Fine*, the union brought a declaratory suit to enjoin the Rhode Island Department of Health from implementing new statewide regulations that mandated influenza vaccination or facemasks for all health care workers.²¹⁰ The union alleged that HIPAA preempted the regulations, rendering the state regulations null.²¹¹ The union contended that the regulations conflicted with HIPAA by requiring health care workers who did not receive the vaccine to wear a surgical mask because it identified those who had and had not received the vaccine.²¹² It argued that this requirement caused health care workers to reveal HIPAA-protected health information.²¹³

The Rhode Island Department of Health filed a motion to dismiss, arguing that the union's HIPAA argument failed for a number of reasons.²¹⁴ First, it argued that HIPAA did not provide for a private right of action.²¹⁵ Second, it argued that patients could deduce certain confidential health care information about health care workers, such as measles or chicken pox vaccination statuses, because certain vaccinations are already required as a condition of employment.²¹⁶ In reply, the union reasserted that the regulations did contradict HIPAA by pointing out that the influenza-vaccination requirement was distinguishable from other vaccination requirements because the influenza vaccine was the only vaccine that

205. *Id.* at 21.

206. *Id.* at 26.

207. *Id.*

208. *Id.* at 2–3.

209. *Id.* at 26.

210. Complaint at 1, *SEIU Healthcare Emps. Union, Dist. 1199 v. Fine*, No. 12-cv-00894-ML (D.R.I. Mar. 5, 2013).

211. *Id.*

212. *Id.* at 17.

213. *Id.*

214. Defendant's Motion to Dismiss at 1, *SEIU Healthcare Emps. Union, Dist. 1199 v. Fine*, No. 12-cv-00894-ML (D.R.I. Mar. 5, 2013).

215. *Id.* at 18–19.

216. *Id.* at 19.

required a facemask for unvaccinated workers.²¹⁷ While the district court was unable to rule on this matter because the parties voluntarily dismissed the case,²¹⁸ the briefings raised a key hurdle that plaintiffs will have to overcome in order to successfully bring a claim that mandatory masks and badges violation HIPAA—the absence of a private right of action.²¹⁹

It appears as though the plaintiffs in each of the respective cases might have been more successful in different procedural postures, because the preliminary injunctions requested cast a difficult standard for the plaintiffs to overcome.²²⁰ However, the critical question raised in these cases was whether or not, in the first instance, health care workers or their representatives may state a claim against their employers for a statutory violation of HIPAA.²²¹

The defendants in *United Nurses of Children's Hospital* and *Dist. 1199* had it right—federal courts have held that HIPAA does not confer a private cause of action.²²² Further, they have found that no implied right to a

217. Plaintiff's Objection to Defendants' Motion to Dismiss at 16 & n.6, SEIU Healthcare Emps. Union, *Dist. 1199 v. Fine*, No. 12-cv-00894-ML (D.R.I. Mar. 5, 2013).

218. Stipulation of Dismissal at 1, SEIU Healthcare Emps. Union, *Dist. 1199 v. Fine*, No. 12-cv-00894-ML (D.R.I. Mar. 5, 2013).

219. See Defendant's Motion to Dismiss, *supra* note 214, at 19.

220. The issuance of a preliminary injunction implies that there is an emergency or special reason for an order before the case can be properly heard. 42 AM. JUR. 2D *Injunctions* § 9 & n.12 (2010) (citing *Brown v. Chote*, 411 U.S. 452, 456 (1973)). A preliminary injunction is considered an extraordinary remedy that judges should issue cautiously. *Id.* A plaintiff seeking a preliminary injunction must establish: (1) "that he or she is likely to succeed on the merits"; (2) "that he or she is likely to suffer irreparable harm"; (3) "that the balance of equities tips in his or her favor"; and (4) "that an injunction is in the public interest." *Id.* at § 9 & n.6 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

221. See Defendant's Opposition to Plaintiff's Request for a Preliminary Injunction Pending Arbitration, *supra* note 197; Defendants' Motion to Dismiss, *supra* note 214, at 18–19.

222. See, e.g., *Acara v. Banks*, 470 F.3d 569, 571 (5th Cir. 2006) ("HIPAA has no express provision creating a private cause of action . . ."); *Johnson v. Quander*, 370 F. Supp. 2d 79, 99–100 (D.D.C. 2005) ("While only a handful of courts have examined whether a private right of action is implied under the HIPAA, each Court has rejected the position."); *Univ. of Colo. Hosp. v. Denver Pub. Co.*, 340 F. Supp. 2d 1142, 1144 (D. Colo. 2004) ("[No section] of HIPAA[]contains any language conferring privacy rights[.]"); *O'Donnell v. Blue Cross Blue Shield of Wyo.*, 173 F. Supp. 2d 1176, 1179–80 (D. Wyo. 2001) (holding there is neither an implied nor an express private right of action under HIPAA); *Means v. Ind. Life & Accident Ins. Co.*, 963 F. Supp. 1131, 1135 (M.D. Ala. 1997) (same); *Wright v. Combined Ins. Co. of Am.*, 959 F. Supp. 356, 363 (N.D. Miss. 1997) (finding no intent in HIPAA to create a new federal cause of action). For more discussion on whether there should be a private right of action under HIPAA, see

private cause of action exists because HIPAA delegates the enforcement of the statute specifically to the Secretary of HHS.²²³ Instead, HHS handles violations of HIPAA through a complaint and investigation process.²²⁴ HHS can then issue criminal penalties and civil damages of up to \$1,500,000 to the offending facility for wrongful disclosures.²²⁵

In addition, plaintiffs face a number of other barriers when relying on HIPAA for relief. The statute provides for exemptions for cases where health care providers may disclose health information without authorization, including for public health activities “for the purpose of preventing or controlling disease.”²²⁶ Therefore, even if HHS enforces HIPAA, the exception for public health matters could provide an exception to the disclosure requirements.

However, not all hope is lost for health care workers utilizing HIPAA to oppose facemask and identification requirements. Certain jurisdictions have found that, although the statutory scheme of HIPAA does not apply, HIPAA can be relevant to common law causes of actions for wrongful disclosure of patient information. Thus, HIPAA may serve as a basis for private actions notwithstanding the inefficacy of the federal statutory basis.²²⁷

IV. RECOMMENDATIONS

Currently, hospitals with mandatory vaccination programs formally utilize two infection-control practices for flu prevention—the influenza vaccination and facemasks.²²⁸ However, hospitals’ policies of requiring their employees to wear facemasks and other identifying material can violate their privacy rights.²²⁹ While the CDC stands behind vaccination as the most effective method to prevent influenza infection, some industry professionals have suggested other infection-control practices as alternatives to the facemask requirements.²³⁰ However, these suggestions present their own set of legal and practical complications.

Jack Brill, Note, *Giving HIPAA Enforcement Room to Grow: Why There Should Not (Yet) Be a Private Cause of Action*, 83 NOTRE DAME L. REV. 2105, 2129 (2008).

223. *Acara*, 470 F.3d at 571.

224. 45 C.F.R. § 160.306 (2014).

225. *Id.* § 160.404.

226. *Id.* § 164.512; SOLOVE & ROTENBERG, *supra* note 188, at 215.

227. *See* 45 C.F.R. § 164.512; SOLOVE & ROTENBERG, *supra* note 188, at 215.

228. Keegan et al., *supra* note 39, at 107.

229. *See supra* Section III.B.

230. Keegan et al., *supra* note 39, at 107 (noting that some hospitals’ alternative infection-control practices include mask requirements, reassignments to non-patient-care duties, and even dismissal of the employee); *Vaccine Effectiveness—How Well Does the*

A. *Other Strategies for Decreasing the Spread of Influenza*

Although health care facilities can pursue alternative infection-control practices to combat influenza in lieu of immunization and facemask requirements, these measures do not appear promising. Hospitals may allow health care workers a more flexible schedule policy to take off work when they become sick with the flu.²³¹ However, those infected with the influenza virus become contagious before they actually start to feel sick, so health care workers can spread the virus to patients even if they stay home when they have symptoms.²³² Further, some workers come to work despite being infected with the influenza virus because they feel pressured by their colleagues, are dedicated to their patients, and are worried about the financial and employment consequences of missing work.²³³

Some advocates of mandatory vaccinations also support education programs that inform employees about the importance of influenza vaccination and encourage employees to get the shot.²³⁴ However, according to one study,

Flu Vaccine Work?, *supra* note 71 (“Getting a flu vaccine each year is the best way to prevent the flu.”).

231. OSHA recommends health care employers encourage their sick workers to stay at home to help reduce the transmission of the seasonal flu virus. *Employer Guidance: Reducing Healthcare Workers’ Exposures to Seasonal Flu Virus*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/dts/guidance/flu/healthcare.html> [https://perma.cc/223D-UVZ2] (last visited Mar. 8, 2016).

232. See Poland et al., *supra* note 21, at 2252 n.16 (“The [flu] virus can be transmitted to patients and other employees by both symptomatic and asymptomatic health care workers—hence, simply ‘staying home from work’ is an insufficient strategy for preventing nosocomial transmission.” (citing Georgia P. Dash, Loretta Pauerbach, Jeanne Pfeiffer, Barbara Soule, Judene Bartley, Bonnie M. Barnard, Tammy Lundstrom & Mary Andrus, *APIC Position Paper: Improving Health Care Worker Influenza Immunization Rates*, 32 AM. J. INFECTION CONTROL 123, 124 (2004)).

233. Pamela Orr, *Influenza Vaccination for Health Care Workers: A Duty of Care*, 11 CAN. J. INFECTIOUS DISEASES & MED. MICROBIOLOGY 225, 225 (2000). Although not involving a mandatory flu vaccination policy, a plaintiff in a different type of matter discussed pressure for missing work due to a flu illness, testifying “that he felt obligated to submit to a flu shot because about two years previously he had missed work because of a severe case of the flu.” *Smith v. Med. & Surgical Clinic Ass’n*, 118 F.3d 416, 420 (5th Cir. 1997). He further testified that he “felt that it was important, in order for [him] to be a good employee and to avoid losing that kind of productivity, for [him] to become vaccinated.” *Id.*

234. Poland et al., *supra* note 21, at 2254. *But see* Hofmann, Ferracin, Marsh & Dumas, *supra* note 22, at 143 (finding that an education program in conjunction with a vaccination program produced an uptake of only 21%).

in hospital settings, education and incentive programs resulted in only small improvements in vaccination coverage.²³⁵

Lastly, other advocates have suggested that hospitals reassign unvaccinated workers to non-patient areas throughout the influenza season.²³⁶ There are a number of practical drawbacks to this solution. For one, reassignment can be costly and inefficient.²³⁷ First, influenza seasons can span a long period—sometimes, as long as twenty-two weeks—and hospitals typically require facemasks for the entirety of the influenza season.²³⁸ Therefore, reassignment as a substitute for a facemask requirement would also last the entire flu season.²³⁹ Second, reassigning a health care worker to another department may be damaging to the health care worker’s career. Many health care workers work solely with patients, so moving into a non-patient contact department could set the health care worker back. Further still, administrators should note that the act of reassignment of duties can also qualify as an adverse employment action that could be viewed as retaliatory under a Title VII framework of religious discrimination.²⁴⁰ Reassignment appears to have just as many complications as the facemask requirement does and therefore is not a viable substitute.²⁴¹

235. Keegan et al., *supra* note 39, at 104 & n.25 (citing Po-Po Lam, Larry W. Chambers, Donna M. Pierrynowski MacDougall & Anne E. McCarthy, *Seasonal Influenza Vaccination Campaigns for Health Care Personnel: Systematic Review*, 182 CAN. MED. ASS’N J. E542 (2010)).

236. *Id.* at 107.

237. See *Frequently Asked Questions (FAQ) Regarding Title 10, Section 2.59, Regulation for Prevention of Influenza Transmission by Healthcare and Residential Facility and Agency Personnel*, N.Y. ST. DEP’T HEALTH (Jan. 2, 2015), http://www.health.ny.gov/diseases/communicable/influenza/seasonal/providers/prevention_of_influenza_transmission/docs/faq_flu_mask_requirements.pdf [<https://perma.cc/U3YH-XEQJ>].

238. *Id.* (“Q: When should mask wear begin and how long must it continue? . . . A: Because influenza activity begins, peaks, and ends at different times in different years, exact dates cannot be given. At a minimum, the Commissioner will likely designate influenza ‘prevalent’ when Department surveillance determines that influenza activity is widespread in the State. . . . Additionally, the Commissioner might designate influenza ‘prevalent’ in specific areas of the state depending upon temporal and geographic activity and might designate influenza prevalent when it is present in the State but not considered widespread, based on characteristics of the influenza season (e.g. intensity of activity, severity of illness).”).

239. *Id.*

240. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 55 (2006) (“[A] reassignment of duties can constitute retaliatory discrimination where both the former and present duties fall within the same job description. Almost every job category involves some duties that are less desirable than others. That is presumably why the EEOC has consistently recognized retaliatory work assignments as forbidden retaliation.”).

241. Randall et al., *supra* note 17, at 1773; Joshua Perry & Jamie Prenkert, *Clarifying the Ethics and Law of Healthcare Employee Flu Shot Refusals*, ALBANY MED. C.: BIOETHICS TODAY (Jan. 24, 2013), <http://www.amc.edu/BioethicsBlog/post.cfm/clarifying-the-ethics-and-law-of-healthcare-employee-flu-shot-refusals> [<https://perma.cc/3XFU-4KCT>].

B. Efficacy of Facemasks in Infection Control

Not only do facemasks create legal complications for health care employers, research into the efficacy of facemasks has failed to demonstrate that facemasks are a viable infection-control practice.²⁴² Generally, there are two types of masks used in health care settings: facemasks and respirators.²⁴³ Facemasks are loose-fitting, disposable masks approved by the FDA for use as medical devices.²⁴⁴ Facemasks are also known as surgical, laser, isolation, dental, and medical procedure masks.²⁴⁵ They work by preventing large-particle droplets of bodily fluids that may contain viruses from escaping the wearer's nose and mouth.²⁴⁶ They also keep splashes and sprays, such as those from sneezes and coughs, from reaching the wearer's nose and mouth.²⁴⁷ However, facemasks do not block small particles in the air.²⁴⁸

Respirators—also called N95 respirator masks—on the other hand, protect the wearer from small particles in the air that may contain viruses.²⁴⁹ The CDC and the National Institute for Occupational Safety and Health

("[I]n the language of equal employment opportunity laws, widespread reassignment could easily result in an undue hardship on the provider's business.").

242. See Faisal bin-Reza, Vicente Lopez Chavarrias, Angus Nicoll & Mary E. Chamberland, *The Use of Masks and Respirators to Prevent Transmission of Influenza: A Systematic Review of the Scientific Evidence*, 6 INFLUENZA & OTHER RESPIRATORY VIRUSES 257, 259 (2012); B.J. Cowling, Y. Zhou, D.K.M. Ip, G.M. Leung & A.E. Aiello, *Face Masks to Prevent Transmission of Influenza Virus: A Systematic Review*, 138 EPIDEMIOLOGY & INFECTION 449, 450–52 (2010); *supra* Section III.B.

243. Colleen Story & Kristeen Cherney, *Does Wearing a Mask Prevent the Flu?*, HEALTHLINE, <http://healthline.com/health/cold-flu/mask#1> [https://perma.cc/NRG2-74Y9] (last updated May 7, 2015).

244. *Prevention Strategies for Seasonal Influenza in Healthcare Settings: Guidelines and Recommendations*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/professionals/infectioncontrol/healthcaresettings.htm> [https://perma.cc/BT5S-V3YT] (last updated Mar. 18, 2016).

245. *Id.*

246. *Masks and N95 Respirators*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/GeneralHospitalDevicesandSupplies/PersonalProtectiveEquipment/ucm055977.htm> [https://perma.cc/F5TP-UQHW] (last updated June 26, 2015).

247. *Id.*

248. *Id.*

249. Story & Cherney, *supra* note 243. N95 masks are so-named because they can filter 95% of airborne particles. *NIOSH-Approved N95 Particulate Filtering Facepiece Respirators*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/niosh/npptl/topics/respirators/disp_part/n95list1.html [https://perma.cc/8FYA-P9PH] (last updated Sept. 9, 2014).

are responsible for certifying these masks.²⁵⁰ A wearer selects a respirator to fit his or her face, and the respirator must form a seal in order to prevent airborne viruses from getting in through gaps.²⁵¹ Because they protect against both large and small particles, respirators are more effective than facemasks at infection control.²⁵² Many health care facilities with mandatory influenza-vaccination policies that include facemask requirements require unvaccinated health care workers to wear facemasks, as opposed to respirators.²⁵³

The research surrounding the efficacy of masks in infection control of influenza and influenza-like infections is mixed at best.²⁵⁴ In a systematic review of international studies on the efficacy of surgical masks in infection control, researchers collected and reviewed seventeen scientific studies.²⁵⁵

250. *Prevention Strategies for Seasonal Influenza in Healthcare Settings: Guidelines and Recommendations*, *supra* note 244.

251. Story & Cherney, *supra* note 243.

252. William G. Lindsley et al., *Measurements of Airborne Influenza Virus in Aerosol Particles from Human Coughs*, 5 PLoS ONE e15100, e15100, <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0015100> [<https://perma.cc/8XP8-K8KR>] (finding that 81% of influenza patients sent viral material through respiratory particles, and 65% of small particles in patients' coughs contained the influenza virus); *Prevention Strategies for Seasonal Influenza in Healthcare Settings: Guidelines and Recommendations*, *supra* note 244.

253. Robert Roos, *Flu Vaccination for Health Workers: Mandate or Persuade?*, U. MINN. CTR. FOR INFECTIOUS DISEASE RES. & POL'Y (Mar. 17, 2010), <http://www.cidrap.umn.edu/news-perspective/2010/03/flu-vaccination-health-workers-mandate-or-persuade> [<https://perma.cc/89UK-39ED>] (“[Hospital Corporation of America]’s policy required all employees to be vaccinated. Those who could not be immunized because of an egg allergy or history of Guillain-Barré syndrome or refused for nonmedical reasons were reassigned to non-patient contact roles or required to wear surgical masks”); *Frequently Asked Questions (FAQ) Regarding Title 10, Section 2.59*, *supra* note 237 (“Q: What types of masks can be worn to meet the requirements of this regulation? . . . A: This regulation requires use of either surgical or procedure masks. Per the U.S. Food and Drug Administration, such masks may be labeled surgical, laser, isolation, dental, or medical procedure facemasks. A face shield is not required. Use of N95 respirators to meet the requirements of this regulation is neither required nor recommended, although N95 respirators should be used when indicated for other reasons.”); *Mandatory Influenza Vaccination Frequently Asked Questions*, JOHNS HOPKINS MED., http://www.hopkinsmedicine.org/mandatory_flu_vaccination/faq.html [<https://perma.cc/FDG4-AL3F>] (last visited Mar. 8, 2016) (“Those who cannot receive the flu vaccine, whether for religious or medical reasons, will be required to properly wear a protective surgical mask over their mouth and nose when within six feet of any patient and when entering a patient room during the influenza season.”); *Questions & Answers About the 2014–2015 Influenza Vaccination Program*, *supra* note 196 (“[M]embers . . . who have not been vaccinated against the flu this year will be **required to wear a mask wherever patients are typically present.**”) (emphasis in original).).

254. See bin-Reza et al., *supra* note 242, at 259; B.J. Cowling et al., *supra* note 242, at 450–52.

255. bin-Reza et al., *supra* note 242, at 259.

The researchers concluded that none of the studies established “a conclusive relationship between facemask or respirator use and protection against influenza infection.”²⁵⁶ While the researchers noted that a few of the studies provided insight on facemask use in household settings, they concluded that, in healthcare and community settings, there was limited evidence that supported the use of facemasks.²⁵⁷

Further, in another comprehensive review study of all English articles published between 1960 and 2009, Cowling and his fellow researchers identified six studies of facemask use in health care settings: (1) a randomized controlled trial of 446 nurses at eight tertiary-care hospitals in Canada, finding “[n]o significant difference between N95 and surgical masks”; (2) a randomized controlled trial following thirty-two health care personnel in Japan, finding “[n]o significant differences between the mask group and control group”; (3) a cross-sectional study of 133 nurses in Hong Kong, finding “[s]uboptimal use of [face shields] during high-risk procedures associated with higher risk of infection”; (4) a cross-sectional study of 250 medical personnel in Saudi Arabia, finding “[n]o significant protective effect of face masks”; (5) a cross-sectional study of fifty dental surgeons in Britain, finding “[n]o significant differences by mask use”; and (6) an observational study of open-air hospitals in Boston during the 1918–1919 Spanish influenza pandemic, finding natural ventilation, hand hygiene, and gauze facemasks associated with fewer observed deaths.²⁵⁸

The systematic reviews demonstrate that the scientific research behind the efficacy of facemasks in preventing the infection and the transmission

256. *Id.*

257. *Id.* at 259, 265.

258. B.J. Cowling et al., *supra* note 242, at 450–52, nn.8–13 (citing Mark Loeb et al., *Surgical Mask vs N95 Respirator for Preventing Influenza Among Health Care Workers: A Randomized Trial*, 302 J. AM. MED. ASS’N 1865 (2009); Joshua L. Jacobs, Sachiko Ohde, Osamu Takahashi, Yasuharu Tokuda, Fumio Omata & Tsuguya Fukui, *Use of Surgical Face Masks to Reduce the Incidence of the Common Cold Among Health Care Workers in Japan: A Randomized Controlled Trial*, 37 AM. J. INFECTION CONTROL 417 (2009); Tak Ching Ng, Nelson Lee, Shu-Cheong David Hui, Raymond Lai & Margaret Ip, *Preventing Healthcare Workers from Acquiring Influenza*, 30 INFECTION CONTROL & HOSP. EPIDEMIOLOGY 292 (2009); Saeed Al-Asmary, Abdul-Salam Al-Shehri, Alaa Abou-Zeid, Moataz Abdel-Fattah, Tamar Hifnawy & Tarek El-Said, *Acute Respiratory Tract Infections Among Hajj Medical Mission Personnel, Saudi Arabia*, 11 INT’L J. INFECTIOUS DISEASES 268 (2007); K.J. Davies et al., *Seroepidemiological Study of Respiratory Virus Infections Among Dental Surgeons*, 176 BRIT. DENTAL J. 262 (1994); Richard A. Hobday & John W. Cason, *The Open-Air Treatment of Pandemic Influenza*, 99 AM. J. PUB. HEALTH S236 (2009)).

of infection is unsettled.²⁵⁹ While health care employers cannot be sure in either the efficacy or inefficacy of facemasks in preventing the spread of influenza, the lack of any bona fide support for the effectiveness of facemasks supports the recommendation that health care employers should discontinue the use of facemasks in their mandatory vaccination programs.²⁶⁰

C. Overall Recommendation

Because facemask requirements within mandatory influenza-vaccination policies can violate the privacy rights of health care workers, hospital administrators should construct and implement mandatory influenza-vaccination policies that comport with the privacy considerations.²⁶¹ Research casts doubt on sick leave policies, education programs, reassignment procedures, and facemask requirements as effective alternative infection-control measures to flu vaccination.²⁶² This begs the question of why hospital influenza-vaccination programs would use these infection-control measures as alternatives to vaccination at all. Some evidence suggests that facemasks and other identifying material serve the purpose of being subtly coercive—meant to pressure unvaccinated health care workers into getting the vaccination.²⁶³ Dr. Aaron Milstone, a member of Johns Hopkins Hospital’s infection-control committee, reported that his hospital’s policy of giving out different colored clips for unvaccinated employees “introduces a bit of peer-pressure incentive to get vaccinated.”²⁶⁴ Likewise, Arnold Monto, a professor of epidemiology at the University of Michigan School of Public Health, finds that increased vaccination rates with programs that include facemask requirements prove that masks stigmatize health care workers.²⁶⁵

259. See bin-Reza et al., *supra* note 242, at 259; B.J. Cowling et al., *supra* note 242, at 450–52.

260. See bin-Reza et al., *supra* note 242, at 259; B.J. Cowling et al., *supra* note 242, at 450–52.

261. See *supra* Section III.B.

262. See *supra* Sections IV.A–B.

263. See Patti Ludwig-Beymer & Sharon Coghlan Gerc, *An Influenza Prevention Campaign: The Employee Perspective*, J. NURSING CARE QUALITY, Apr. 2002, at 1, 4–7; see also THE CANADIAN PRESS, *Union Says Ontario Nurses Can’t Be Forced to Wear Masks in Flu Season*, CBC NEWS (Sept. 10, 2015, 1:26 PM), <http://www.cbc.ca/news/canada/toronto/union-says-ontario-nurses-can-t-be-forced-to-wear-masks-in-flu-season-1.3222702> (reporting that arbitrator in case between the Ontario Nurses Association and thirty Ontario hospitals found “vaccinate or mask” policy to be “a coercive tool” to force health care workers into getting vaccinations).

264. Alice Park, *Can Health-Care Workers Be Forced to Get Flu Shots?*, TIME (Oct. 19, 2009), <http://content.time.com/time/magazine/article/0,9171,1929232,00.html>.

265. Katherine Harmon, *Are Health Care Workers Who Decline Flu Shots Irresponsible?*, SCI. AM. (Sept. 27, 2011), <http://www.scientificamerican.com/article/health-care-workers-flu-shot/> [<https://perma.cc/ZD59-R3UB>].

Therefore, mandatory programs should not include *any* facemask requirements. Health care administrators should implement mandatory influenza-vaccination policies in the same manner that existing programs have already demonstrated success.²⁶⁶ These programs should continue to allow for religious and medical exemptions that duly comply with the requirements mandated by the EEOC in Title VII and the ADA.²⁶⁷ Under a voluntary program without any facemask requirement, some health care workers might choose not to be vaccinated because there is no consequence for going unvaccinated. However, by making vaccination mandatory, instead of voluntary, employers can reduce the number of health care workers who would opt out because only employees with formal approval would be able to receive exemptions.

While facemask policies that only require health care workers to wear facemasks when there are within a certain vicinity of patients are less burdensome than full-time requirements, they still require hospital administration to keep track and monitor the health care workers who are exempt.²⁶⁸ This usually requires some sort of identifying badge.²⁶⁹ By eliminating the facemask requirement altogether, there is no physical differentiation between exempt and non-exempt health care workers, and the administration does not have to keep track of the different vaccination statuses.²⁷⁰

Further, a number of large hospitals have demonstrated that the percentage of health care workers who duly qualify for exemptions is small enough to be a negligible proportion of the total employee population.²⁷¹ For example, at one hospital with a mandatory vaccination program, administrators granted medical exemptions to 321 employees, just 1.24% of the total number of employees, and religious accommodations were granted to ninety employees, 0.35% of the total employees.²⁷² In that hospital, less than 2% of the entire hospital employee population did not receive the influenza

266. See Rakita et al., *supra* note 32, at 881, 883; Talbot et al., *supra* note 96, at 989 (outlining examples of health care facilities that have moved successfully to mandatory influenza-vaccination policies, including the Hospital of the University of Pennsylvania, Children's Hospital of Philadelphia, Emory University Hospital, University of California Davis Health System, Loyola University Health System, and University Hospital in Cincinnati).

267. See *supra* Section III.A.

268. See Transcript of Oral Argument, *supra* note 120.

269. See *id.*

270. See *id.*

271. Babcock et al., *supra* note 37, at 461.

272. *Id.*

vaccination through the exemption process in place.²⁷³ Therefore, the number of unmasked and unvaccinated health care workers would likely be a small proportion of the total hospital population.

Because facemasks can violate the privacy rights of health care workers, are not proven to be an effective infection-control method, can be coercive, can burden hospital administration by requiring them to keep track of unvaccinated employees, and only impact a small number of health care workers, hospitals should implement mandatory influenza-vaccination programs without any facemask or other identification requirements.

V. CONCLUSION

As mandatory influenza-vaccination programs become more widespread for health care workers, an increasing number of health care workers will be required to either receive influenza vaccination or exempt out.²⁷⁴ Health care workers with exemptions are typically required to wear facemasks and other identifying material under their employers' exemption policies.²⁷⁵ Health care administrators should craft mandatory influenza-vaccination policies that take into account the privacy rights of employees who exempt out of the program when deciding whether to require exempt employees to wear facemasks.²⁷⁶ To avoid these legal issues, health care administrators should implement mandatory influenza-vaccination programs that have no facemask or other identification requirements at all.²⁷⁷

273. *Id.*

274. *See supra* Section III.A.

275. *See supra* Section III.A.

276. *See supra* Section III.B.

277. *See supra* Section IV.C.