The Mandatory Vaccination of Health Care Workers
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Many of us have spent time during the last few winters in search of flu vaccines, as outbreaks of H1N1 and other strains have focused global attention on pandemic prevention.

Introduction

The H1N1 outbreaks of 2009 focused global attention on pandemic prevention through vaccination. As efforts to develop and deliver H1N1 vaccinations to health care workers (HCW) began, reluctance to accept vaccinations became apparent. This reluctance prompted efforts to encourage health care worker vaccination.

On August 13, 2009, the New York State Hospital Review and Planning Council adopted an emergency regulation mandating the vaccination of HCW for seasonal and H1N1 influenza. New York State Commissioner of Health Richard F. Daines, in support of the mandate, stated that voluntary vaccination only resulted in staff immunization rates of 40-50%. According to Commissioner Daines, low vaccination rates can lead to “institutional outbreaks ... every flu season” and that “[m]edical literature convincingly demonstrates that high levels of staff immunity confer protection on those patients who cannot be or have not been effectively vaccinated ... .” All New York HCW were to receive the seasonal and H1N1 influenza vaccine by November 30, 2009, or be terminated from employment unless the vaccine was medically contraindicated.

Four nurses, the New York State Public Employees Federation, and the New York State United Teachers Union brought suit to halt the mandatory vaccination, which resulted in the issuance of a temporary restraining order. In the end, New York did not enforce mandatory vaccination of HCW for H1N1 due to a vaccine shortage. These cases highlight concerns over mandatory vaccination. What follows is a discussion of the importance of vaccinating HCW; the civil liberty concerns associated with mandatory vaccination; as well as examples of different states’ regimes and exceptions.

I. Health Care Workers are Critical to Protecting Public Health

“Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”

HCW are limited in number; their health is a priority. HCW “have a responsibility to protect their own health and well-being, grounded in their professional commitment to ensure adequate availability of care.” Influenza can disrupt continuity of care and vaccinating health care personnel reduces influenza infections, resulting in fewer working days lost. Furthermore, HCW provide care for vulnerable populations. Pro vaccination advocates argue that HCW have a duty “not to harm a patient when [they]..."
know[,] there is a significant risk of harm through infection” and the vaccination’s benefit outweighs its burden and risk.xii HCW need to be vaccinated to protect public health, and research has indicated they will not do so voluntarily in larger enough numbers.xiii For example, surveys conducted in early 2009 indicated that voluntary pre-pandemic vaccination levels among HCW in Hong Kong were below 50%.xiv Therefore, mandatory vaccination of HCW may be warranted to prevent a pandemic.

II. Civil Liberty Issues of Mandatory Vaccinations

Mandatory vaccinations create concerns over individual autonomy over one’s body. As long ago as 1905, arguments made in Jacobson v. Massachusetts xv summarize the most basic reasoning behind such concerns: “[mandatory vaccination is] hostile to the inherent right of every freeman to care for his own body and health in such a way as to him seems best . . . ”xvi However, there is not an absolute right for an individual to be entirely without restraint.xvii There are restraints placed on all people for the common good, without which organized society would be unsafe.xviii Individual rights must be balanced against public safety. In fact, the Court found there is no

element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the State.xix

The State’s power is not absolute when it comes to vaccination. A court may strike down vaccination regulatory enforcement if “the police power of a State . . . [is] exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression.”xx How far a regulatory scheme must go to be arbitrary and oppressive is unclear, but it shows the Court is cognizant of potential issues with implementation of vaccination regimes.xx

State Statutes Promoting Vaccination of Health Care Workers

The H1N1 outbreak and resulting need to protect the public prompted many states to implement policies designed to promote health care worker vaccination.xxii Some states went so far as to effectively make vaccination a condition of health care employment.xxiii These efforts created significant discussion over civil rights concerns,xxiv including the right to make one’s own medical decisions, the right to freely practice one’s religion, and the right to privacy.xxv

There is a need to balance public health and civil liberties when implementing mandatory vaccination regimes. The Supreme Court rulings on mandatory vaccinations have used the “arbitrary or oppressive” standard to effectively set a minimum level of civil liberty protections.xxvi States wishing to grant a greater level of civil liberty protections have elected to offer reasonable exceptions including medical contraindication and religious belief.
Two Common Exceptions

A. Medically Contraindicated

Some states have created an exception for situations where vaccination is medically contraindicated. The proof required to qualify for this exception varies by state. In Maine, one must present “a physician’s written statement that immunization ... is medically inadvisable.” Contrast that with New Hampshire’s law which requires vaccines be administered “in accordance with the recommendations of the Advisory Committee on Immunization Practices [ACIP] of the Center for Disease Control and Prevention.” ACIP promulgates specific recommendations on administration and contraindication, reducing physician discretion in granting an exception because a vaccine is medically inadvisable.

B. Freedom of Religious Practice

Although states cannot create a law prohibiting the free exercise of religion, individuals’ freedom to practice religion may be limited where doing so infringes upon community safety. In Prince v. Massachusetts, the court noted that a parent “cannot claim freedom from compulsory vaccination . . . on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.” Furthermore, some courts find no explicit First Amendment provision for a religious exemption to mandatory vaccination. It should be noted that an individual state or private employer may provide specifically for a religious exemption or opt-out, and many do.

Balancing the Need for Vaccination and the Desire to Offer Exceptions

While some states have elected to allow HCW to simply opt-out of vaccination, concerns about low vaccination participation led other states to adopt more rigid approaches, requiring that all HCW be vaccinated unless they fall within an allowable exception.

One way to balance these competing concerns would be to offer exceptions for medical contraindication and religious belief when possible, but allow public health officials to disallow exceptions when necessary. The determination that exceptions should be disallowed would only be appropriate when granting exceptions resulted in a vaccination percentage insufficient to effectively protect public health. This system would help protect civil liberties by requiring public health officials to show ineffective vaccination levels prior to disallowing reasonable exceptions for HCW. Such a showing could be challenged by concerned HCW, adding an additional layer of protection and transparency.

Privacy Concerns Relating to Mandatory Vaccination

For those states allowing for opt-outs or exceptions, hospitals have a variety of methods for publicly indicating who has not received mandatory vaccinations, including: color coded stickers, masks, or badges indicating that workers wearing masks are unvaccinated. Making such information publicly available may infringe upon the privacy rights of HCW. For instance, Johns Hopkins Hospital’s (Hopkins)
policy initially used colored clips attached to hospital ID badges for personnel who received vaccinations, one color for seasonal flu and another color for H1N1.\textsuperscript{xli} Hopkins ultimately decided not to provide a separate color for H1N1 vaccination recognition because H1N1 vaccine was prioritized for certain groups, and therefore might divulge private health information.\textsuperscript{xlii} In the end, Hopkins personnel were provided an opt-out, but were required to wear a mask when within three feet of patients.\textsuperscript{xliii}

As Hopkins discovered, implementing procedures that identify vaccinated or unvaccinated individuals may ultimately end with unintended consequences. One court has determined a policy requiring masks or stickers to indicate vaccination created the “collateral and unnecessary effect of calling the employees’ status to the attention of patients and the public[,]” thereby stigmatizing employees.\textsuperscript{xlv} The Court ordered the parties “to eliminate any stigmatizing procedures associated with the new vaccination policy.”\textsuperscript{xlvii} Institutions should therefore be mindful of privacy concerns when they distinguish between the vaccinated and unvaccinated.

Conclusion

The limited number of HCW makes maintaining their health paramount in combating outbreaks. Unfortunately, the only way to accomplish this may be through a mandatory vaccination regime, as studies show up to 60% of HCW will opt-out of vaccination if allowed. The public health and legal communities must determine how to implement mandatory vaccinations among HCW to ensure the next outbreak does not become a pandemic.

\begin{footnotesize}
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\item H1N1 was sometimes referred to as the “Swine Flu,” \textit{See} Centers for Disease Control, \textit{The 2009 H1N1 Pandemic: Summary Highlights, April 2009-April 2010} (2010), available at \url{http://www.cdc.gov/h1n1flu/cdcresponse.htm}.
\item N.Y. Comp. Codes R. & Regs. Tit. 10, §66-3 (2009). New York specifically sets out which diseases HCW are required to receive a vaccination against. \textit{Id}.
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Jacobson v. Massachusetts}, 197 U.S. 11, 27 (1905) (emphasis added).
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The ethics of mandatory vaccination against influenza for health care workers, Vaccine Vol. 26, 5562, 5562 (2008). (Note, this article relates to nursing home health care providers with a conclusion regarding obligations of HCW equally applicable to other health care settings.)

Id. (e.g., those with weakened immune systems, elderly, very young, and pregnant).

Josette S. Y. Chor et al., Willingness of Hong Kong Healthcare Workers to Accept Pre-Pandemic Influenza at Different WHO Alert Levels: Two Questionnaire Surveys, BMJ 2009 339, 339 (2009).

197 U.S. 11.

Id. at 26.

Id.

Id.

Id. at 38.


“Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety.” Jacobson, 197 U.S. at 31 (dicta).


See supra note 2.

See supra Section II. “Civil Liberty Issues of Mandatory Vaccinations” for general discussion. See also Jacobson, 197 U.S. 11, supra note 11; and Caviezal, 2010 U.S. Dist. Lexis 100451, infra note 36.

Most states regimes require health care providers to make vaccinations available to health care workers at no cost, thus avoiding the argument that vaccination creation an undue financial burden. See CA Health Code § 1288.7(a) (2007): “Annually offer onsite influenza vaccinations, if available, to all hospital employees at no cost to the employee.”; See also N.Y. Comp. Codes R. & Regs. Tit. 10, §66-3 (2009): “…facility shall arrange for the … vaccination(s) at no cost to the … personnel.”


Code Me. R. 10-144 Ch. 264, §3 A, supra note 32. See also, 7 Alaska Admin. Code 12.650 (2011) requiring that a “physician sign a certificate that there are medical reasons that dictate that an employee should not be vaccinated...” (Note this provision only relates to Rubella).


U.S. Const. Amend. I.
See supra Section II. “Civil Liberty Issues of Mandatory Vaccinations” for discussion.
Id. at 166-67 (citing People v. Pierson, 176 N.Y. 201 (1903).
Caviezel v. Great Neck Public Schools, 2010 U.S. Dist. Lexis 100451, at 31-32 (E.D.N.Y 2010). See id. at 28-33 for Justice Spatt’s thorough discussion of mandatory vaccination and analysis of relevant Supreme Court opinions and other federal case law relating to religious exemptions for vaccination.
See Code Me. R. §10-144 Ch. 264 Section 3 (2011), See also N.H. Rev. Stat §151:9-b (2010). See also supra Section II.A “Medically Contraindicated”.
See CA Health Code § 1288.7 (a) (2007). See also, TN ADC 1200-08-01-.06.
For example, Rhode Island created exceptions where, “(1) the vaccine is contraindicated; [or] (2) [i]t is against . . . religious beliefs. . . .” R.I. Gen. Laws § 23-17.19-5 (b) (2010).
Beyond indication and tracking, public identification may be used to as peer pressure to incentivize vaccination. See Alice Park, Can Health-Care Workers be Forced to Get Flu Shots?, Time magazine online, Monday, Oct. 19, 2009, available at http://www.time.com/time/magazine/article/0,9171,1929232,00.html. (See specifically comments of Aaron Milstone).
For example, pregnant women and those with weakened immune systems. Id.
Id. It is worth noting that this decision required the parties to participate in collective bargaining under a CBA. Another interesting argument against forcing those who opt-out of wearing face masks and/or unique badges is presented in United Nurses of Children’s Hospital v. Rady; where the argument is proffered that doing so may be a violation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). 2009 WL 6310667 (S.D. Cal. 2009).