

en to the top of the agenda. As we move toward national health care reform, we must balance individuals' needs for high-quality care with the obligation to be socially and fiscally responsible.

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Mandatory Vaccination of Health Care Workers

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Mandatory vaccination of health care workers raises important questions about the limits of a state's power to compel individuals to engage in particular activities in order to protect the public. In justifying New York State's regulations requiring health care workers who have direct contact with patients or who may expose patients to disease to be vaccinated against seasonal and H1N1 influenza, New York State Health Commissioner Richard Daines recently argued, "[O]ur overriding concern . . . as health care workers, should be the interests of our patients, not our own sensibilities about mandates. . . . [T]he welfare of patients is . . . best served by . . . very high rates of staff immunity that can only be achieved with mandatory influenza vaccination — not the 40-50% rates of staff immunization historically achieved with even the most vigorous of voluntary programs. Under voluntary standards, institutional outbreaks occur. . . .

Medical literature convincingly demonstrates that high levels of staff immunity confer protection on those patients who cannot be or have not been effectively vaccinated . . . while also allowing the institution to remain more fully staffed."¹

Workers at diagnostic and treatment centers, home health care agencies, and hospices are included in New York's requirement, although workers who can show that they have a recognized medical contraindication to vaccination are exempt. Each facility will have the discretion to determine the steps that unvaccinated health care workers must take to reduce the risk of transmitting disease to patients (see table).

Many health care workers believe that the mandate violates fundamental individual rights and public health policy, and some have filed court actions. In response, one judge ordered a delay in implementing the regulation, and New York's governor, David Paterson, suspended the re-

quirement so that the limited supply of H1N1 vaccine currently available can be distributed to the populations most at risk for serious illness and death.

The workers argue, first, that compulsory vaccination violates the Fourteenth Amendment in depriving them of liberty without due process. But in 1905, in deciding the smallpox-vaccination case *Jacobson v. Commonwealth of Massachusetts*, the U.S. Supreme Court recognized that the "police powers" granted to states under the Tenth Amendment authorize them to require immunization. Police powers are government's inherent authority to impose restrictions on private rights for the sake of public welfare. Thus, health administrators may develop measures that compel individuals to accept vaccinations in order to protect the public's health.

Such measures include immunization requirements for school entry, which have been enacted by all states and the District of Columbia. These mandates have been

New York State's Requirements for Influenza Vaccination of Personnel in Health Care Facilities.*	
Immunization requirements Sec. 66-3.2	As a precondition to employment and on an annual basis, in accordance with the national recommendations in effect, unless there is an inadequate supply of vaccine
Affected facilities Sec. 66 – 3.1 (c)	General hospitals, diagnostic and treatment centers, certified home health agencies, long-term home health care programs, AIDS home care programs, licensed home care services agencies, hospices
Affected personnel Sec. 66 – 3.1 (b)	All persons employed by or affiliated with a health care facility: <ul style="list-style-type: none"> • Paid or unpaid • Employees, medical staff, contract staff, students, and volunteers who have direct contact with patients, or whose activities are such that if they were infected with influenza, they could potentially expose patients, or others who have direct contact with patients, to influenza
Nonaffected personnel Sec. 66 – 3.1 (b)	<ul style="list-style-type: none"> • Personnel who do not have direct contact with patients • Personnel who do not engage in activities that could potentially expose patients, or others who have direct contact with patients, to influenza <ul style="list-style-type: none"> Those whose job site is physically separated from a patient care location and who have no direct contact with patients Those whose job activities would require only infrequent or incidental direct contact with others who might have direct contact with patients, provided that such direct contact is unlikely to transmit influenza (e.g., administrative tasks, data entry, building maintenance)
Exceptions Sec. 66 – 3.6	Medical contraindication in accordance with nationally recognized guidelines
Facility's obligations Sec. 66 – 3.3, 3.5, 3.6, 3.7	<ul style="list-style-type: none"> • Provide or arrange for influenza vaccinations at no cost to personnel, either at the facility or elsewhere depending on personal choice • Maintain vaccination documentation in personnel file • Determine the steps that those who are unvaccinated because of medical contraindication must take to reduce the risk of transmitting influenza to patients • Report aggregate vaccination status to the Department of Health
Personnel's obligations Sec. 66 – 3.3; 3.4	Existing personnel: <ul style="list-style-type: none"> • No later than 11/30 of each year, receive vaccination from a source of their own choosing or one chosen by the facility • Provide documentation to the facility Newly hired personnel: <ul style="list-style-type: none"> • After 11/30 and before 4/01, receive vaccination if the facility determines that they are unvaccinated
Statutory authority	<ul style="list-style-type: none"> • The State Department of Health has the comprehensive responsibility for the development and administration of the state's policy regarding facilities. • The State Hospital Review and Planning Council is authorized to adopt and amend rules and regulations regarding home health agencies, hospice organizations, long-term home health care programs, and AIDS home care programs.

* The requirements are from Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York §66-3.1-3.7 (2009).

shown to be the most effective method of increasing rates of coverage among school-age children and have withstood multiple legal challenges. In 1922, in *Zucht v. King* (a case regarding an immunization requirement for school entry in San Antonio, Texas), the Supreme Court endorsed these ordinances, finding that they “confer not arbitrary power, but only that broad discretion required for the protection of the public health.” Opponents of such requirements argue that they are

improper on the grounds that they amount to illegal search and seizure under the Fourth Amendment or that they violate either the equal protection clause of the Fourteenth Amendment (“no state shall . . . deny to any person within its jurisdiction the equal protection of the laws”) or the establishment clause of the First Amendment (“Congress shall make no law respecting an establishment of religion”). Yet on the basis of the principles outlined in *Jacobson*, the judiciary has

consistently affirmed that an individual's right to refuse immunization is outweighed by the community-wide protection conferred by immunization.

Some health care workers in New York have argued that *Jacobson* does not apply in the case of influenza because there is no health emergency and because the H1N1 influenza virus is not as serious as smallpox. In 2002, in *Boone v. Boozman*, an Arkansas court heard from opponents of a school-entry requirement for hep-

atitis B vaccination, who argued that both *Jacobson* and *Zucht* were irrelevant because they were decided during declared smallpox emergencies, whereas hepatitis B presented no “clear and present danger.” The court held that “the Supreme Court did not limit its holding in *Jacobson* to diseases presenting a clear and present danger.” Furthermore, “even if such a distinction could be made, the Court cannot say that hepatitis B presents no such clear and present danger. Hepatitis B may not be airborne like smallpox; however, this is not the only factor by which a disease could be judged dangerous.” The court concluded that “immunization of school children against hepatitis B has a real and substantial relation to the protection of the public health and the public safety.”

Health care workers in New York also argue that because the regulation offers no possibility for religious exemptions, it violates the “free exercise” clause of the First Amendment, which guarantees that government may not interfere with a person’s religious beliefs. But individuals may not engage in activities that threaten important societal interests and expect to be shielded by the First Amendment. When reviewing state initiatives that hinder religious expression, courts weigh the importance of a claim of religious exercise against the state interest. Courts have upheld school-entry vaccination requirements against objections that they infringed on individuals’ religious principles. States have the discretion to determine whether to permit religious exemptions, and Arizona, Mississippi, and West Virginia do not permit such exemptions. Thus, in the absence of a Supreme Court ruling, it is

unlikely that the exclusion of a religious exemption from the New York regulation will be considered to be unconstitutional.

The health care workers also argue that the regulation violates the right to “freedom of contract” between employer and employee, as guaranteed by the Fifth and Fourteenth Amendments. However, states are obligated to protect the public welfare, even when doing so affects economic liberty. Furthermore, the Supreme Court has held that states may promulgate regulations restricting liberty of contract in order to protect community health or vulnerable populations.²⁻⁴ Although New York’s regulation affects employer–employee relationships, it is permissible because promoting patients’ health and safety is a legitimate state interest. Health care workers must receive other vaccinations as a condition of employment, yet they have not challenged those requirements.

The health care workers further claim that the regulation violates the Fourteenth Amendment right of competent adults to bodily autonomy and the right to refuse medical treatment. Yet the right to refuse treatment is not absolute. In determining whether the regulation violates the personal autonomy of health care workers, courts will, once again, balance individual rights against state interests. The state’s power weakens and the individual’s rights strengthen as the degree of bodily invasion increases and the effectiveness of the intervention decreases.⁵ Courts will consider the extent to which health care workers cause illness and death among patients by exposing them to influenza. Vaccinating health care workers is the most effective means of re-

ducing outbreaks; health care workers are required to submit to the limited intrusion of vaccination in order to protect both themselves and the patients in their care. I believe that the state’s right to compel health care workers to receive vaccinations will supersede their individual rights because of the state’s substantial relation to protection of the public health and safety.

Certainly, courts must take into account Constitutional guarantees of personal autonomy, freedom of contract, and freedom of religion when reviewing the current lawsuits. These rights, however, have been constrained when they conflict with government measures that are intended to protect the community’s health and safety. Health care workers have a profound effect on patients’ health. Although they have the same rights as all private citizens, it is likely that courts will continue to make the health and safety of patients the priority in permitting exceptions to individual rights.

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4. *Muller v. Oregon*, 208 U.S. 412 (1908).
5. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

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