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# Mandatory Vaccinations: Precedent and Current Laws

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May 21, 2014

**Congressional Research Service**

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[www.crs.gov](http://www.crs.gov)

RS21414

## Summary

Historically, the preservation of the public health has been the primary responsibility of state and local governments, and the authority to enact laws relevant to the protection of the public health derives from the state's general police powers. With regard to communicable disease outbreaks, these powers may include the enactment of mandatory vaccination laws. This report provides an overview of the legal precedent for mandatory vaccination laws, and of state laws that require certain individuals or populations, including school-aged children and health care workers, to be vaccinated against various communicable diseases. Also discussed are state laws providing for mandatory vaccinations during a public health emergency or outbreak of a communicable disease.

Federal jurisdiction over public health matters derives from the Commerce Clause of the United States Constitution, which states that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States....” Congress has enacted requirements regarding vaccination of immigrants seeking entry into the United States, and military regulations require American troops to be immunized against a number of diseases. The Secretary of Health and Human Services has authority under the Public Health Service Act to issue regulations necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the states or from state to state. Current federal regulations do not include any mandatory vaccination programs; rather, when compulsory measures are needed, measures such as quarantine and isolation are generally utilized to halt the spread of communicable diseases.

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## History and Precedent

At the end of the 20<sup>th</sup> century, the Centers for Disease Control and Prevention (CDC) published its list of the “Ten Great Public Health Achievements” for the United States from 1900 to 1999. Number one on the list was vaccination.<sup>1</sup> Vaccination has resulted in the eradication of smallpox worldwide, and in the control of many other vaccine-preventable diseases.<sup>2</sup> Mandatory vaccination programs, such as school immunization requirements, have played a major role in controlling rates of vaccine-preventable diseases in the United States.<sup>3</sup>

Historically, the preservation of the public health has been the primary responsibility of state and local governments, and the authority to enact laws relevant to the protection of the public health derives from the state’s general police powers.<sup>4</sup> With respect to the preservation of the public health in cases of communicable disease outbreaks, these powers may include the institution of measures such as quarantine and isolation<sup>5</sup> or the enactment of mandatory vaccination laws.<sup>6</sup> Mandatory vaccination laws were first enacted in the early 19<sup>th</sup> century, beginning with Massachusetts’ smallpox vaccination law in 1809.<sup>7</sup>

*Jacobson v. Massachusetts* is the seminal case regarding a state or municipality’s authority to institute a mandatory vaccination program as an exercise of its police powers.<sup>8</sup> In *Jacobson*, the Supreme Court upheld a Massachusetts law that gave municipal boards of health the authority to require the vaccination of persons over the age of 21 against smallpox, and determined that the vaccination program instituted in the city of Cambridge had “a real and substantial relation to the protection of the public health and safety.”<sup>9</sup> In upholding the law, the Court noted 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.”<sup>10</sup> The Court added that such laws were within the full discretion of the state, and that federal powers

<sup>1</sup> CDC, U.S. Dep’t of Health & Human Servs., *Ten Great Public Health Achievements—United States, 1900-1999*, 48 MORBIDITY & MORTALITY WKLY. REP. 12, 241 (1999).

<sup>2</sup> See WORLD HEALTH ORGANIZATION, WHO TECHNICAL REPORT SERIES NO. 926 (2004) available at <http://www.who.int/biologicals/publications/trs/areas/vaccines/smallpox/Annex%201%20%2827-64%29TRS926Smallpox2003.pdf?ua=1> (hereinafter TECHNICAL REPORT); WORLD HEALTH ORGANIZATION, IMMUNIZATION COVERAGE (February 2014), <http://www.who.int/mediacentre/factsheets/fs378/en/>.

<sup>3</sup> Orenstein, Walter A, *The Role of Measles Elimination in Development of a National Immunization Program*, 25(12) *Pediatr. Infect. Dis. J.* 1093, 1093-1101 (2006) available at <http://www.ncbi.nlm.nih.gov/pubmed/17133153>.

<sup>4</sup> See *The People v. Robertson*, 134 N.E. 815, 817 (Ill. 1922).

<sup>5</sup> For more information on state and federal quarantine authority, see CRS Report RL33201, *Federal and State Quarantine and Isolation Authority*, by (name redacted) and (name redacted).

<sup>6</sup> Starting with the smallpox vaccine, vaccines have been used to halt the spread of disease for over 200 years. Donald A. Henderson & Bernard Moss, *Smallpox and Vaccinia*, in VACCINES 74, 75 (Stanley A. Plotkin & Walter A. Orenstein eds., 3d ed. 1999). See also Howard Markel, M.D. *Life, Liberty and the Pursuit of Vaccines*, N.Y. TIMES (February 29, 2011), [http://www.nytimes.com/2011/03/01/health/01smallpox.html?\\_r=1&ref=health](http://www.nytimes.com/2011/03/01/health/01smallpox.html?_r=1&ref=health).

<sup>7</sup> LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT, 181 n.27 (2000).

<sup>8</sup> 197 U.S. 11 (1905).

<sup>9</sup> *Id.* at 31. The Massachusetts statute in question reads: “Boards of health, if in their opinion it is necessary for public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants of their towns, and shall provide them with the means of free vaccination. Whoever refuses or neglects to comply with such requirement shall forfeit five dollars.” M.G.L.A. c. 111, §181 (2014).

<sup>10</sup> *Jacobson*, 197 U.S. at 25.

with respect to such laws extended only 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.”<sup>11</sup>

The Court addressed constitutional concerns raised by the petitioner in *Jacobson*, but remained unconvinced that his rights were “contravened” by the mandatory vaccination program. The petitioner argued that “a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person.”<sup>12</sup> The Court rejected the petitioner’s constitutional challenge and noted that “the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person, to be, at all times and in all circumstances wholly free from restraint.”<sup>13</sup> However, the Court did acknowledge limits to the state’s power to protect the public health and set forth a reasonableness test for public health measures:<sup>14</sup>

[I]t might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.

## State Mandatory Vaccination Laws

### School Vaccination Requirements

Every state and the District of Columbia has a law requiring children entering school to provide documentation that they have met the state immunization requirements.<sup>15</sup> In 1827, Boston was the

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 26.

<sup>13</sup> *Id.* In *Adams v. Milwaukee*, 228 U.S. 572, 581-82 (1913), the Supreme Court reaffirmed *Jacobson*’s holding that states may delegate the power to order vaccinations to local municipalities for the enforcement of public health regulations. See also *Zucht v. King*, 260 U.S. 174, 176 (1922) (holding that vaccination laws do not discriminate against schoolchildren to the exclusion of others similarly situated, i.e., children not enrolled in school); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding generally that the right to practice religion does not include the liberty to jeopardize the wellbeing of minors).

<sup>14</sup> *Id.* at 28. Smallpox vaccinations are no longer administered since smallpox has been eradicated worldwide as of 1980. See TECHNICAL REPORT, *supra* note 2. One author has suggested that while Mr. Jacobson might be successful in his refusal to be vaccinated against smallpox today because smallpox has been eradicated, the threat of terrorists using smallpox as a weapon might make the use of the vaccine a reasonable measure yet again. Andrew Zoltan, *Jacobson Revisited: Mandatory Polio Vaccination as an Unconstitutional Condition*, 13 GEO. MASON L. REV. 735, 747-752 (2005). See also CRS Report RS21288, *Smallpox: Technical Background on the Disease and Its Potential Role in Terrorism*, by (name redacted).

<sup>15</sup> James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L. J. 831, 868-73 (2001/2002). See NATIONAL CONFERENCE OF STATE LEGISLATURES, STATES WITH RELIGIOUS AND PHILOSOPHICAL EXEMPTIONS FROM SCHOOL IMMUNIZATION REQUIREMENTS (December 2012), <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

first city to require vaccination against smallpox for public school students.<sup>16</sup> Other cities and states adopted the policy, and state statutes were amended as new vaccines were introduced.<sup>17</sup>

Many modern school vaccination laws are the result of measles outbreaks in the 1960s and 1970s.<sup>18</sup> Generally, states use the Centers for Disease Control and Prevention's schedule of immunizations as a guide, and require children to be vaccinated against a number of diseases on the schedule, including diphtheria, measles, rubella, and polio.<sup>19</sup> Various state laws also require vaccination against hepatitis B and meningococcal disease for incoming college and university students.<sup>20</sup> In addition, Virginia and the District of Columbia require female students to be vaccinated against the Human Papillomavirus (HPV).<sup>21</sup> Recently, some states and cities have begun requiring young children in preschool or daycare to receive influenza vaccinations.<sup>22</sup>

Despite the wide-spread imposition of school vaccination requirements, many states provide exemptions for medical, religious, or philosophical reasons. These provisions vary state by state, with medical exemptions for children who may suffer adverse effects from the vaccine being the most common. Thus, all states allow medical exemptions for those whose immune systems are compromised, who are allergic to vaccines, are ill at the time of vaccination, or have other medical contraindications to vaccines.<sup>23</sup> Generally, for a medical exemption, parents or guardians must provide documentation from a physician.<sup>24</sup> Nearly all states grant exemptions for persons who oppose immunizations for religious reasons.<sup>25</sup> Exemptions based on philosophical or moral convictions in opposition to immunization are less common but are provided by 19 states.<sup>26</sup> Some

<sup>16</sup> *Id.* at 851.

<sup>17</sup> *Id.* at 867.

<sup>18</sup> *Id.* at 868.

<sup>19</sup> See CENTERS FOR DISEASE CONTROL AND PREVENTION, VACCINES AND IMMUNIZATIONS (February 7, 2013), <http://www.cdc.gov/vaccines/schedules/index.html> (hereinafter CDC VACCINES).

<sup>20</sup> See STATE INFORMATION, HEPATITIS B PREVENTION MANDATES FOR COLLEGES AND UNIVERSITIES, IMMUNIZATION ACTION COALITION (June 29, 2010), <http://www.immunize.org/laws/hepbcollege.asp>; STATE INFORMATION, MENINGOCOCCAL PREVENTION MANDATES FOR COLLEGES AND UNIVERSITIES, IMMUNIZATION ACTION COALITION (June 2, 2011), <http://www.immunize.org/laws/menin.asp>.

<sup>21</sup> See Va. Code 32.1-46 (2014); D.C. Code 7-....04(b) (2014).

<sup>22</sup> See NEW YORK CITY BOARD OF HEALTH, INFLUENZA VACCINATION REQUIREMENTS FOR CHILDREN IN DAYCARE OR PRESCHOOL (last visited May 5, 2014), <http://www.nyc.gov/html/doh/downloads/pdf/imm/day-care-flu-faq.pdf>. New Jersey and Connecticut have similar requirements. See STATE INFORMATION, IMMUNIZATION ACTION COALITION (December 1, 2010), [http://www.immunize.org/laws/flu\\_childcare.asp](http://www.immunize.org/laws/flu_childcare.asp).

<sup>23</sup> NATIONAL CONFERENCE OF STATE LEGISLATURES, STATES WITH RELIGIOUS AND PHILOSOPHICAL EXEMPTIONS FROM SCHOOL IMMUNIZATION REQUIREMENTS (December 2012), <http://www.ncsl.org/Default.aspx?TabId=14376>.

<sup>24</sup> For example, in Colorado, an exemption from the vaccination requirements may be obtained by submitting to the school a certification from a licensed physician that “the physical condition of the student is such that one or more specified immunizations would endanger his or her life or health or is medically contradicted due to other medical conditions.” COLO. REV. STAT. §25-4-903(2)(a) (2014).

<sup>25</sup> Two states, Mississippi and West Virginia, do not provide for an exemption based on religious beliefs. The Mississippi Supreme Court has held that religious exemptions to mandatory vaccination violate equal protection rights under the Fourteenth Amendment because the exemptions “require the great body of school children to be vaccinated and at the same time expose them to the hazard of associating in school with children exempted under the religious exemption who had not been immunized as required by the statute.” *Brown v. Stone*, 378 So.2d 218, 223 (Miss. 1979). See CRS Report RL34708, *Religious Exemptions for Mandatory Health Care Programs: A Legal Analysis*, by Cynthia Brougher.

<sup>26</sup> The 19 states that, as of 2012, allowed philosophical exemptions for persons who object to immunizations because of personal, moral or other nonreligious beliefs are Arizona, Arkansas, California, Colorado, Idaho, Louisiana, Maine, Michigan, Minnesota, Missouri (applies only to daycare, preschool and nursery school), North Dakota, Ohio, (continued...)

states specify that religious or philosophical beliefs be “sincere” or “conscientiously held.”<sup>27</sup> The statutes allowing religious exemptions vary, with some requiring only a statement of dissent from the student, parent, or guardian, and others requiring a more specific statement regarding the child’s membership in a religious denomination that opposes immunizations.<sup>28</sup> In addition, states that require the HPV vaccination offer broad opt-outs for parents who simply apprise themselves of HPV’s risks, without a medical exemption or religious objection requirement.<sup>29</sup>

Compulsory vaccination laws as a prerequisite for school enrollment have been the subject of numerous court cases.<sup>30</sup> In *Zucht v. King*, the Supreme Court upheld a local ordinance requiring vaccinations for schoolchildren.<sup>31</sup> The Court invoked *Jacobson* for the principle that states may use their police power to require vaccinations, and noted that the ordinance did not bestow “arbitrary power, but only that broad discretion required for the protection of the public health.”<sup>32</sup> In turn, most lower courts have given considerable deference to the use of the states’ police power to require immunizations to protect the public health.<sup>33</sup> For example, West Virginia does not offer a religious exemption from school vaccination requirements, but the United States Court of Appeals for the Fourth Circuit has rejected free exercise, equal protection, and substantive due process challenges to the law.<sup>34</sup>

Nonetheless, when states do offer religious exemptions, they generally may not be limited to “recognized religious organizations,” as some courts have invalidated such provisions as violating both the Establishment and Free Exercise Clauses.<sup>35</sup> Courts often construe these exemptions broadly, and prevent the state from inquiring into the sincerity of a parent’s religious objections.<sup>36</sup>

(...continued)

Oklahoma, Pennsylvania, Texas, Utah, Vermont, Washington, and Wisconsin. NATIONAL CONFERENCE OF STATE LEGISLATURES, STATES WITH RELIGIOUS AND PHILOSOPHICAL EXEMPTIONS FROM SCHOOL IMMUNIZATION REQUIREMENTS (December 2012), <http://www.ncsl.org/Default.aspx?TabId=14376>.

<sup>27</sup> See, e.g., M. G.L.A. c. 76, §15 (2014); MINN. STAT. ANN. §121A.15 (2014).

<sup>28</sup> See, e.g., LA. REV. STAT. ANN. §17:170E (2014); KAN. STAT. ANN. §72-5209(b)(2) (2014). In *Galinsky v. Board of Education of New York*, 213 F.3d 626 (2d Cir. 2000), the circuit court upheld the district court’s finding that the parents’ claim for a religious exemption was motivated by their personal fears for their daughters’ wellbeing, and not by religious beliefs.

<sup>29</sup> See Va. Code 32.1-46 (2014); D.C. Code 7-.....04(b) (2014).

<sup>30</sup> Steve P. Calandrillo, *Vanishing Vaccinations: Why are So Many Americans Opting Out of Vaccinating Their Children?*, 37 Mich. J.L. Reform 353, 385-388 (2004).

<sup>31</sup> 260 U.S. 174 (1922).

<sup>32</sup> *Id.* at 177.

<sup>33</sup> Calandrillo, *supra* note 30, at 387-388. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Zucht v. King*, 260 U.S. 174, 176 (1922); *Adams v. Milwaukee*, 228 U.S. 572, 581-82 (1913); *Seubold v. Fort Smith Special Sch. Dist.*, 237 S.W.2d 884, 887 (Ark. 1951) (mandatory school vaccination does not deprive individuals of liberty and property interests without due process of law); *McCartney v. Austin*, 293 N.Y.S. 2d 188, 200 (N.Y. 1968) (New York vaccination law does not interfere with freedom to worship since Roman Catholic faith does not proscribe vaccination).

<sup>34</sup> See *Workman v. Mingo Cty. Bd of Educ.*, 419 Fed.Appx. 348 (4<sup>th</sup> Cir. 2011).

<sup>35</sup> *Compare Sherr v. Northport-East Northport Union Free School Dist.*, 672 F.Supp. 81 (E.D.N.Y. 1987) (invalidating a limitation for “recognized religious organization” and ruling that plaintiffs were included in the exemption) *with Boone v. Boozman*, 217 F.Supp.2d. 938 (E.D. Ark. 2002) (invalidating the entire religious exemption on establishment and free exercise grounds).

<sup>36</sup> See *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 654-55 (E.D.N.Y. 1994) (holding that a Jewish parent’s “sincere religious belief” may support an opposition to immunizations, even though the Jewish religion does not prohibit vaccinations); *Jones ex rel. Jones v. State, Dep’t of Health*, 18 P.3d 1189, 1195 (Wyo. 2001) (health department may not require that a student provide a medical reason for seeking a waiver from immunization); *In re LePage*, 18 P.3d 1177, 1180 (Wyo. 2001) (holding that a health department may not inquire into the sincerity of a (continued...))

However, some courts have found that certain parents' objections are personal, rather than religious in nature, and have upheld the denial of exemptions on these grounds.<sup>37</sup>

## Health Care Workers

A number of states have laws requiring employees of certain health care facilities, such as hospitals and nursing homes, to be vaccinated against diseases such as measles, mumps, and rubella. Such laws, which vary widely, generally contain opt-out provisions where a vaccine is medically contraindicated or if the vaccine is against the individual's religious or philosophical beliefs.<sup>38</sup> A few states have laws pertaining to influenza vaccination of health care workers, and most that do provide for voluntary influenza immunization programs and staff education measures for employees; however, a few states have mandatory requirements for influenza vaccinations for health care workers.<sup>39</sup>

During the 2009 influenza A(H1N1) pandemic, despite an extensive public education campaign, less than half of health care workers were vaccinated against pandemic influenza.<sup>40</sup> In August 2009, the New York State Health Department amended its regulations to require that health care workers at hospitals, in home health care agencies, and in hospice care be immunized against influenza viruses as a precondition to employment and on an annual basis.<sup>41</sup> This regulation, issued on an emergency basis, did not permit any exceptions to the influenza vaccination mandate except for medical contraindications. Lawsuits were filed challenging the regulation's validity, and on October 16, 2009, a state judge issued a temporary restraining order suspending its application to New York health care workers.<sup>42</sup> On October 22, 2009, Governor David A. Paterson announced the suspension of the flu shot mandate for health care employees due to the current shortage of both the seasonal flu vaccine and the pandemic flu vaccine.<sup>43</sup> However, effective July 31, 2013, New York state requires health care workers not immunized against influenza to wear a surgical or procedure mask during times the Health Commissioner determines

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parent's religious objection to immunizations).

<sup>37</sup> See *Caviezel v. Great Neck Public Schools*, 500 Fed. Appx. 16 (2d Cir. 2012); *Check ex rel. MC v. New York City Dep't of Educ.*, 13-CV-791 SLT LB, 2013 WL 2181045 (E.D.N.Y. May 20, 2013).

<sup>38</sup> Megan C. Lindley et al., *Assessing State Immunization Requirements for Healthcare Workers and Patients*, 2 AM. J. PREVENTIVE MEDICINE, 459-465 (2007).

<sup>39</sup> The CDC maintains a continuously updated online database of state laws pertaining to vaccination requirements for health care workers. See CENTERS FOR DISEASE CONTROL AND PREVENTION, STATE IMMUNIZATION LAWS FOR HEALTHCARE WORKERS AND PATIENTS (current as of December 2013), <http://www2a.cdc.gov/nip/StateVaccApp/statevaccsApp/default.asp>. See generally Abigale L. Ottenberg, Joel T. Wu, and Gregory A. Poland, et al., *Vaccinating Health Care Workers Against Influenza: The Ethical and Legal Rationale for a Mandate*, 101 AM. J. P. HEALTH 212-216 (2011).

<sup>40</sup> K.M. Harris et al., *Influenza Vaccine - Safe, Effective, and Mistrusted*, 363 N.E. J. MED. 2183-2185 (2010).

<sup>41</sup> N.Y. Comp. Codes R. & Regs. tit. 10, §66-3.2 See also Press Release, Richard F. Daines, New York State Health Commissioner (September 24, 2009) available at [http://www.health.state.ny.us/press/releases/2009/2009-09-24\\_health\\_care\\_worker\\_vaccine\\_daines\\_oped.htm](http://www.health.state.ny.us/press/releases/2009/2009-09-24_health_care_worker_vaccine_daines_oped.htm).

<sup>42</sup> The temporary restraining order issued by state Supreme Court Judge Thomas J. McNamara, may be accessed at <http://op.bna.com/hl.nsf/r?Open=sfak-7wvsxh>.

<sup>43</sup> See Anemona Hartocollis & Swell Chan, *Flu Vaccine Requirement for Health Care Workers is Lifted*, NYTIMES.COM (October 22, 2009), [http://www.nytimes.com/2009/10/23/nyregion/23flu.html?\\_r=0](http://www.nytimes.com/2009/10/23/nyregion/23flu.html?_r=0). In September, 2010, Sen. Tom Duane of the New York state legislature suggested the issue be reconsidered.



influenza is prevalent.<sup>44</sup> New Hampshire has a similar requirement which has been challenged under the Due Process Clause in federal district court.<sup>45</sup>

In the private sector, employers sometimes require health care workers to be vaccinated against communicable diseases as a condition of employment, unless a state law applies which permits employees to opt out.<sup>46</sup> A number of professional organizations, including the Infectious Diseases Society of America and the American College of Physicians, endorse the proposition that health care workers have a professional and ethical responsibility to help prevent the spread of infectious pathogens among patients and themselves, and that health care workers should receive annual influenza vaccinations as a condition of employment and professional privileges.<sup>47</sup> In 2004, Virginia Mason Hospital in Seattle, WA, became the first hospital in the nation to make vaccination a condition of employment for all of its employees. Within three years, the hospital reported 98% staff coverage, except for 2% of the staff who refused for medical or religious reasons.<sup>48</sup> Staff who refuse the vaccine are required to wear surgical masks when in the hospital. Other hospitals in the private sector have instituted similar mandatory flu vaccination policies,<sup>49</sup> and some policies have been the subject of lawsuits. News reports have highlighted health care workers fired for refusing to be vaccinated against influenza.<sup>50</sup>

Challenges have been brought to such requirements on several grounds. For example, the Washington State Nurses Association filed suit against Virginia Mason Hospital in 2007 alleging that implementing the mandatory flu vaccination policy without first negotiating with the nurses' union violated the Labor Management Relations Act.<sup>51</sup> The Court of Appeals for the Ninth Circuit upheld an arbitrator's decision prohibiting Virginia Mason Hospital from unilaterally implementing the vaccination policy without bargaining with the

<sup>44</sup> The requirement applies during "influenza season," as determined by the Commissioner. See New York State Dept. of Health, Regulation for Prevention of Influenza Transmission by Healthcare and Residential Facility and Agency Personnel (last updated April 2, 2014), [http://www.health.ny.gov/diseases/communicable/influenza/seasonal/providers/prevention\\_of\\_influenza\\_transmission/](http://www.health.ny.gov/diseases/communicable/influenza/seasonal/providers/prevention_of_influenza_transmission/).

<sup>45</sup> See SEIU Healthcare Employees Union, Dist. 1199 v. Fine, et al., Case 1:12-cv-00894-ML-PAS (D.R.I. December 6, 2012) available at SEIU Healthcare Employees Union, Dist. 1199 v. Fine, et al., Case 1:12-cv-00894-ML-PAS.

<sup>46</sup> The Joint Commission, a private accreditation body, requires accredited organizations such as hospitals and skilled nursing facilities to offer influenza vaccinations to licensed independent practitioners and staff as a condition of accreditation. See OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA) FACT SHEET, SEASONAL INFLUENZA VACCINATION – IMPORTANT PROTECTION FOR HEALTHCARE WORKERS (November 2011) available at <http://www.osha.gov/Publications/seasonal-flu-factsheet.pdf>.

<sup>47</sup> A list of organizations and links to their policy statements may be found at <http://www.immunize.org/honor-roll/>. The American College of Physicians policy declares that "health care workers that cannot receive flu vaccines due to medical or religious contraindications should either be reassigned to non-patient care areas during influenza season or wear a mask at all times during influenza season in the context of patient care." S.A. Fryhofer, *Immunization 2011: Expanding Coverage, Enhancing Protection*, 154 ANNUALS INTERNAL MED. 204-206 (2011).

<sup>48</sup> Anita Manning, *Hospitals Shoot for Employees to Get Flu Vaccine*, USATODAY.COM (September 16, 2007), [http://www.usatoday.com/news/health/2007-09-16-flu-doctors\\_N.htm](http://www.usatoday.com/news/health/2007-09-16-flu-doctors_N.htm). See also paper presented at 42<sup>nd</sup> NIC National Immunization Conference—Mandatory Influenza Vaccination: The Virginia Mason Story, March 18, 2008, Atlanta, Georgia available at [http://cdc.confex.com/recording/cdc/nic2008/ppt/free/4db77adf5df9ff0d3caf5cafe28f496/paper15824\\_5.ppt](http://cdc.confex.com/recording/cdc/nic2008/ppt/free/4db77adf5df9ff0d3caf5cafe28f496/paper15824_5.ppt).

<sup>49</sup> See, e.g., H.M. Babcock et al., *Mandatory Vaccination of Healthcare Workers: Translating Policy to Practice*, 50 CLINICAL INFECTIOUS DISEASES 459-464 (2010) available at <http://cid.oxfordjournals.org/content/50/4/459.full>.

<sup>50</sup> See e.g., Allie Malloy, *Pregnant Nurse: I Was Fired for Refusing Flu Vaccine*, CNNHEALTH.COM (December 29, 2013), <http://www.cnn.com/2013/12/29/health/pregnant-nurse-flu-vaccine-refusal/>; Sydney Lupkin, *Eight Hospital Employees Fired for Refusing Flu Vaccines*, ABCNEWS.COM (January 3, 2012), <http://abcnews.go.com/Health/indiana-hospital-fires-nurses-refusing-flu-shot/story?id=18116967>.

<sup>51</sup> *Virginia Mason Hosp. v. Washington State Nurses Ass'n*, 511 F.3d 908 (9<sup>th</sup> Cir. 2007).

nurses' union.<sup>52</sup> In addition, an employee terminated by a children's hospital for refusing to receive an influenza vaccination brought suit alleging religious discrimination in violation of Title VII of the Civil Rights Act.<sup>53</sup> The plaintiff's views were rooted in "veganism," but the judge denied the defendant's summary judgment motion because it was "plausible that Plaintiff could subscribe to veganism with a sincerity equating that of traditional religious views."<sup>54</sup> Elsewhere, a hospital employee discharged for refusing to take an influenza vaccination filed a claim in South Carolina for unemployment benefits. An administrative board found that the hospital's failure to grant an exemption was unreasonable, but a South Carolina state court of appeals vacated this decision. It explained that "a determination of how to protect patients from life-threatening illnesses such as influenza is a complicated medical and scientific evaluation that should be made by hospitals, not the Department of Employment and Workforce, the ALC, or this court."<sup>55</sup>

In 2008, the Department of Defense (DOD) issued a policy directive requiring "all civilian health care personnel who provide direct patient care in DOD military treatment facilities to be immunized against seasonal influenza infection each year as a condition of employment, unless there is a documented medical or religious reason not to be immunized."<sup>56</sup> The Department of Veterans Affairs has an influenza vaccination program for patients and employees of the Veterans Health Administration that encourages, but does not mandate, yearly influenza vaccinations.<sup>57</sup>

## Vaccination Orders During a Public Health Emergency

Many states also have laws providing for mandatory vaccinations during a public health emergency or outbreak of a communicable disease. Generally, the power to order such actions rests with the governor of the state or with a state health officer. For example, a governor may have the power to supplement the state's existing compulsory vaccination programs and institute additional programs in the event of a civil defense emergency period.<sup>58</sup> Or, a state health officer may, upon declaration of a public health emergency, order an individual to be vaccinated "for communicable diseases that have significant morbidity or mortality and present a severe danger to public health."<sup>59</sup> In addition, exemptions may be provided for medical reasons or where

<sup>52</sup> *Id.* at 917.

<sup>53</sup> *Chenzira v. Cincinnati Children's Hosp. Med. Ctr.*, 1:11-CV-00917, 2012 WL 6721098 (S.D. Ohio December 27, 2012).

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

<sup>55</sup> *AnMed Health v. S. Carolina Dep't of Employment & Workforce*, 404 S.C. 224, 229, 743 S.E.2d 854, 857 (S.C. Ct. App. 2013). The Court did find, however, that the plaintiff's reason for non-compliance was itself reasonable. *Id.*

<sup>56</sup> Department of Defense/Joint Forces, HA Policy: 08-005, Policy for Mandatory Seasonal Influenza Immunization for Civilian Health Care Personnel Who Provide Direct Patient Care in Department of Defense Military Treatment Facilities (April 4, 2008) available at <http://mhs.osd.mil/Content/docs/pdfs/policies/2008/08-005.pdf>. See *infra*, "Role of the Federal Government." See also Assistant Secretary of Defense, Memorandum, Addition of Pandemic Influenza Vaccine or Novel Vaccine to the Policy for Mandatory Seasonal Influenza Immunization for Civilian Health Care Personnel who Provide Direct Patient Care in Department of Defense Military Treatment Facilities (July 28, 2011), <http://www.health.mil/~media/MHS/Policy%20Files/Import/11-010.ashx>.

<sup>57</sup> See DEPARTMENT OF VETERANS AFFAIRS, VHA SEASON INFLUENZA MANUAL (2013-2014) available at <http://www.publichealth.va.gov/docs/flu/va-flu-manual-2013-14.pdf>.

<sup>58</sup> HAW. REV. STAT. §128-8 (2014). In Arizona, the Governor, during a state of emergency or state of war emergency in which there is an occurrence or the imminent threat of smallpox or other highly contagious and highly fatal disease, may "issue orders that ... mandate treatment or vaccination of persons who are diagnosed with illness resulting from exposure or who are reasonably believed to have been exposed or who may reasonably be expected to be exposed." ARIZ. REV. STAT. §36-787 (2014).

<sup>59</sup> FLA. STAT. §381.00315 (2014).

objections are based on religion or conscience.<sup>60</sup> However, if a person refuses to be vaccinated, he or she may be quarantined during the public health emergency giving rise to the vaccination order. State statutes may also provide additional authority to permit specified groups of persons to be trained to administer vaccines during an emergency in the event insufficient health care professionals are available for vaccine administration.<sup>61</sup>

## Model State Emergency Health Powers Act

In addition to the current laws, many states have considered the provisions set forth in the Model State Emergency Health Powers Act (Model Act). The Model Act was drafted by The Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities.<sup>62</sup> It seeks to “grant public health powers to state and local public health authorities to ensure strong, effective, and timely planning, prevention, and response mechanisms to public health emergencies (including bioterrorism) while also respecting individual rights.”<sup>63</sup> It is important to note that this is intended to be a model for states to use in evaluating their emergency response plans; passage of the Model Act in its entirety is not required, so state legislatures may select the entire act, parts of it, or none at all. Many states have used sections of the Model Act while tailoring their statutes and regulations to respond to unique situations that may arise in their jurisdiction.<sup>64</sup>

The Model State Emergency Health Powers Act addresses a number of issues likely to arise during a public health emergency and offers guidelines for states with respect to what powers may be necessary during such an emergency. With respect to vaccinations, the Model Act includes provisions similar to the current laws discussed above. Under the Model Act, during a public health emergency, the appropriate public health authority would be authorized to “vaccinate persons as protection against infectious disease and to prevent the spread of contagious or possibly contagious disease.”<sup>65</sup> The Model Act requires that the vaccine be administered by a qualified person authorized by the public health authority, and that the vaccine “not be such as is reasonably likely to lead to serious harm to the affected individual.”<sup>66</sup> The Model Act recognizes that individuals may be unable or unwilling to undergo vaccination “for reasons of health, religion, or conscience,” and provides that such individuals may be subject to quarantine to prevent the spread of a contagious or possibly contagious disease.<sup>67</sup> State adoption of the Model Act's provisions has varied.<sup>68</sup> Some statutes delegate power to the state to require

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<sup>60</sup> See, e.g., CONN. GEN. STAT. §19a-222 (2014) (exemption for physician's determination of sickness); VA. CODE ANN. §32.1-48 (2014) (vaccination waived if detrimental to person's health, as certified by a physician); WIS. STAT. §252.041 (2014) (vaccination may be refused for reasons of religion or conscience). See generally W.E. Parmet, *Pandemic Vaccines - The Legal Landscape*, 362 N.E. J. MED. 1949-1952 (2010).

<sup>61</sup> See Stephen Smith, *State Takes Extra Steps to Battle Flu in the Fall*, BOSTON.COM (August 13, 2009) [http://www.boston.com/news/health/articles/2009/08/13/state\\_asks\\_volunteers\\_to\\_aid\\_flu\\_vaccinations/](http://www.boston.com/news/health/articles/2009/08/13/state_asks_volunteers_to_aid_flu_vaccinations/).

<sup>62</sup> See THE CENTERS FOR LAW & THE PUBLIC'S HEALTH: A COLLABORATIVE AT JOHNS HOPKINS AND GEORGETOWN UNIVERSITIES, THE MODEL STATE EMERGENCY HEALTH POWERS ACT (MSEHPA) (January 27, 2010), <http://www.publichealthlaw.net/ModelLaws/MSEHPA.php>.

<sup>63</sup> *Id.*

<sup>64</sup> The Center for Law and the Public's Health tracked state legislative activity relating to the Model Act through 2006. See *Id.*

<sup>65</sup> The MODEL STATE EMERGENCY HEALTH POWERS ACT, Article VI, Sec. 603 (December 21, 2001) available at <http://www.publichealthlaw.net/MSEHPA/MSEHPA.pdf>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* See Section 604 of the Model Act for provisions relating to quarantine.

<sup>68</sup> See Ben Horowitz, *A Shot in the Arm: What a Modern Approach to Jacobson v. Massachusetts Means for Mandatory* (continued...)

vaccinations in a public health emergency,<sup>69</sup> or to impose quarantine requirements.<sup>70</sup> In contrast, other states provide that individuals may refuse vaccinations.<sup>71</sup>

## Role of the Federal Government

Federal jurisdiction over public health matters derives from the Commerce Clause, which states that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States....”<sup>72</sup> Thus, under the Public Health Service Act, the Secretary of the Department of Health and Human Services has authority to make and enforce regulations necessary “to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.”<sup>73</sup> With regard to interstate commerce, the Public Health Service Act deals primarily with the use of quarantine and isolation measures to halt the spread of certain communicable diseases.<sup>74</sup> No mandatory vaccination programs are specifically authorized, nor do there appear to be any regulations regarding the implementation of a mandatory vaccination program at the federal level during a public health emergency.<sup>75</sup>

With regard to foreign countries, the Secretary has the power to restrict the entry of groups of aliens for public health reasons.<sup>76</sup> This power includes the authority to issue vaccination requirements for immigrants seeking entry into the United States. Currently, certain vaccines specified in statute, and other vaccines recommended by the CDC Advisory Committee on Immunization Practices for the general U.S. population, are required for immigrants who seek permanent residence in the United States, and people currently living in the United States who seek to adjust their status to become permanent residents.<sup>77</sup> CDC has determined that two diseases

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*Vaccinations in a Public Health Emergency*, 60 Am. U. L. Rev. 1715 (2011).

<sup>69</sup> See Fla. Stat. Ann. 381.00315(1)(b)4.b (2014); Ariz. Rev. Stat. Ann. §36-787 (2014).

<sup>70</sup> See Haw. Rev. Stat. §321-1 (2014); Ariz. Rev. Stat. Ann. §36-787 (2014).

<sup>71</sup> See Minn. Stat. Ann. 12.39 (2014).

<sup>72</sup> U.S. CONST. Art. I, §8. Recognizing that vaccines occasionally cause adverse events, and to assure a supply of vaccines while still providing a financial remedy to those injured, Congress passed the National Vaccine Injury Compensation Act, which created the National Vaccine Injury Program. That program provides a no-fault compensation plan, with capped damages for pain and suffering. 42 U.S.C. §§300aa-1–300aa-34.

<sup>73</sup> 42 U.S.C. §264(a). Originally, the statute conferred this authority on the Surgeon General; however, pursuant to Reorganization Plan No. 3 of 1966, all statutory powers and functions of the Surgeon General were transferred to the Secretary.

<sup>74</sup> See 42 C.F.R. Parts 70 (interstate matters) & 71 (foreign arrivals).

<sup>75</sup> It may be noted that Congress established a vaccine injury compensation program in the 1980’s which provides a no-fault mechanism to resolve vaccine injury claims and provides partial immunity for vaccine manufacturers. See U.S. Department of Health and Human Services, National Vaccine Injury Compensation Program (last visited May 21, 2014), <http://www.hrsa.gov/vaccinecompensation/>; CRS Report RL33927, *Selected Federal Compensation Programs for Physical Injury or Death*, coordinated by (name redacted) and (name redacted). The Countermeasures Injury Compensation Program provides compensation for use of countermeasures in an emergency. See U.S. Department of Health and Human Services, Countermeasures Injury Compensation (last visited May 21, 2014), <http://www.hrsa.gov/cicp/>; CRS Report RS22327, *Pandemic Flu and Medical Biodefense Countermeasure Liability Limitation*, by (name redacted).

<sup>76</sup> See 8 U.S.C. §1182.

<sup>77</sup> See the CDC Division of Global Migration and Quarantine website for information on vaccination requirements for immigrants at <http://www.cdc.gov/immigrantrefugeehealth/exams/medical-examination.html>. For further information (continued...)

for which vaccines are recommended for routine use by the ACIP—for human papillomavirus (HPV) and zoster (shingles)—do not have the potential to cause outbreaks, and are therefore not required for admission.<sup>78</sup> Vaccination requirements may be waived when the foreign national receives the vaccination, if the civil surgeon or panel physician certifies that the vaccination would not be medically appropriate, or if the vaccination would be contrary to the foreign national’s religious or moral beliefs.<sup>79</sup>

Likewise, the military has broad authority in dealing with its personnel, both military and civilian, including the protection of their health.<sup>80</sup> Military regulations require American troops to be immunized against a number of diseases, including tetanus, diphtheria, influenza, hepatitis A, measles, mumps, rubella, polio, and yellow fever.<sup>81</sup> Inoculations begin upon entry into military service, and later vaccines depend upon troop specialties or assignments to different geographic areas of the world. Courts have upheld the legality of military mandatory vaccination orders. For example, in *United States v. Chadwell*,<sup>82</sup> two U.S. Marines refused to be vaccinated against smallpox, typhoid, paratyphoid, and influenza because of their religious beliefs.<sup>83</sup> In upholding the convictions, the Navy Board of Review court (now the Navy-Marine Corps Court of Criminal Appeals) stated that religious beliefs were not above military orders and that “to permit this would be to make the professed doctrines of religious belief superior to military orders, and in effect to permit every soldier to become a law unto himself.”<sup>84</sup> Federal courts do not appear to contradict this reasoning. One district court, in reviewing a denial of a discharge decision of the Commandant of the Marine Corps under an “arbitrary and capricious standard,” noted the lawfulness of the military’s anthrax vaccination program, and noted military commanders’ “overriding responsibility to protect the health and safety of American military personnel by administering appropriate vaccines when faced with the growing threat of biological and

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about health-related grounds for exclusion of immigrants see CRS Report R40570, *Immigration Policies and Issues on Health-Related Grounds for Exclusion*, by (name redacted).

<sup>78</sup> See CDC, “Criteria for Vaccination Requirements for U.S. Immigration Purposes,” 74 *Federal Register* 58634-58638 (November 13, 2009).

<sup>79</sup> 8 U.S.C. §1182(g)(2).

<sup>80</sup> Congress’ war powers include the power to “raise and support Armies,” to “provide and maintain a Navy,” and to “make Rules for the Government and Regulation of the land and naval Forces.” U.S. CONST. Art. 1, §8, cls. 12-14. The Supreme Court has called these powers “broad and sweeping,” *United States v. O’Brian*, 391 U.S. 367 (1967), and the Court gives its highest level of deference to legislation made under Congress’ authority to raise and support armies and make rules and regulations for their governance. See *Rostker v. Goldberg*, 453 U.S. 47 (1981).

<sup>81</sup> See Department of Defense (DOD) Directive Number 6200.04, “Force Health Protection,” (2004); DOD Directive Number 6205.02E, “Policy and Programs for Immunizations to Protect the Health of Service Members and Military Beneficiaries,” (2006) available at <http://www.dtic.mil/whs/directives/corres/dir.html>. See also Army Regulation 40-562, *Immunizations and Chemoprophylaxis* (September 29, 2006) available at [http://www.vaccines.mil/documents/969r40\\_562.pdf](http://www.vaccines.mil/documents/969r40_562.pdf).

<sup>82</sup> 36 C.M.R. 741 (1965).

<sup>83</sup> *Id.* at 748.

<sup>84</sup> *Id.* Current Army regulations, *supra*, note \*, Ch. 2, Para 2-6, permit two types of exemptions from immunization, medical and administrative, under certain circumstances. A mandatory anthrax vaccination program for certain military personnel, begun in 1998, has been the subject of various lawsuits brought by members of the military who argued the vaccine was unproven and that studies describing its safety were unsound. In one case, *Rempfer v. Von Eschenbach*, 535 F. Supp. 2d 99 (D. D.C. 2008), the court held that the FDA had applied its expertise and found that the anthrax vaccine in question was effective for immunization against anthrax. The court refused to substitute its own judgment for that of the FDA. The court of appeals affirmed the district court ruling in *Rempfer v. Sharfstein*, 583 F. 3d 860 (D.C. Cir. 2009). See also Dep. of Defense, *Anthrax Vaccine Immunization Program* available at <http://www.vaccines.mil/default.aspx?cnt=resource/qaAll&dID=21&cID=350>.

chemical weaponry.”<sup>85</sup> Likewise, the Court of Appeals for the District of Columbia Circuit upheld a Department of Defense policy of using unapproved, investigational drugs on military members in combat situations without their consent.<sup>86</sup> Finally, in two recent cases the plaintiffs were discharged from the military for refusing to receive anthrax vaccinations. They brought claims challenging the Secretary of the Air Force’s denial of their requests to correct the disciplinary records on the matter from their files. In both cases, the District Court for the District of Columbia ruled that the decision of the Board for the Correction of Military Records was not arbitrary and capricious.<sup>87</sup>

As noted above, state and local governments have primary responsibility for protecting the public health, and this has been reflected in the enactment of various state laws requiring that school children be vaccinated against certain diseases before enrolling in school and that health care workers be vaccinated as a condition of employment, as well as laws providing for mandatory vaccination procedures during a public health emergency. Any federal mandatory vaccination program applicable to the general public would likely be limited to areas of existing federal jurisdiction, i.e., interstate and foreign commerce, similar to the federal quarantine authority.<sup>88</sup> This limitation on federal jurisdiction acknowledges that states have the primary responsibility for protecting the public health, but that under certain circumstances, federal intervention may be necessary.

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<sup>85</sup> O’Neil v. Sec’y of Navy, 76 F. Supp. 2d 641, 645 (W.D. Pa. 1999).

<sup>86</sup> Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991).

<sup>87</sup> See Bates v. Donley, 935 F. Supp. 2d 14, 23 (D.D.C. 2013); Martin v. Donley, 886 F. Supp. 2d 1, 13 (D.D.C. 2012).

<sup>88</sup> It has been suggested that in the case of a serious outbreak of a communicable disease, the federal government might enact policies to encourage vaccinations or place restrictions on those who refuse. BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE, THE ROLE OF LAW ENFORCEMENT IN PUBLIC HEALTH EMERGENCIES 19 (September 2006) available at <https://www.ncjrs.gov/pdffiles1/bja/214333.pdf>.

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