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Healthcare Workers' Religious Objections to Mandatory Influenza Vaccination: Examining Title VII's Religious Accommodation Requirement

INTRODUCTION

Influenza is a contagious virus that can cause mild to severe respiratory illness and, at times, result in death.¹ Healthcare personnel infected with influenza working in hospitals and other healthcare facilities can transmit the virus to coworkers and to patients who are more susceptible to risks of severe complications from the illness.² Experts agree that vaccination of healthcare personnel is the best method to reduce influenza infection and prevent mortality in patients.³ However, because a significant portion of the healthcare workforce has continued to be unvaccinated, outbreaks of nosocomial (hospital-acquired) influenza⁴ have occurred for decades throughout the United States.⁵

Since 1981, the Centers for Disease Control and Prevention (CDC) have recommended that all healthcare personnel receive an annual influenza vaccination to protect themselves and vulnerable patients.⁶ As part of the Healthy People program, the Department of Health and Human Services (HHS) has set a goal of increasing the percentage of healthcare personnel who

¹ *Seasonal Influenza: Flu Basics*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 12, 2013), <http://www.cdc.gov/flu/about/disease/index.htm> [hereinafter *Flu Basics*].

² *People at High Risk of Developing Flu-Related Complications*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 18, 2013), http://www.cdc.gov/flu/about/disease/high_risk.htm [hereinafter *People at High Risk*].

³ *Information for Healthcare Professionals*, NAT'L ADULT AND INFLUENZA IMMUNIZATION SUMMIT (Oct. 4, 2012), http://www.preventinfluenza.org/profs_workers.asp.

⁴ A nosocomial infection--also called 'hospital acquired infection' can be defined as: An infection occurring in a patient in a hospital or other health care facility in whom the infection was not present or incubating at the time of admission. This includes infections acquired in the hospital but appearing after discharge, and also occupational infections among staff of the facility. *Prevention of Hospital-Acquired Infections: A Practical Guide* (2nd Edition), WORLD HEALTH ORG. (2002), <http://www.who.int/csr/resources/publications/drugresist/en/whocdscsreph200212.pdf> [hereinafter *Prevention of Hospital-Acquired Infections*].

⁵ *Call to Action: Influenza Immunization Among Health Care Personnel*, NAT'L FOUND. FOR INFECTIOUS DISEASES (2008), <http://www.nfid.org/publications/cta/flu-hcp-cta08.pdf> [hereinafter *Call to Action*].

⁶ *Influenza Vaccine 1980-1981: Recommendation of the Public Health Service Immunization Practices Advisory Committee*, 93 ANN. INTERN. MED. 466, 466-68 (1980) [hereinafter *Influenza Vaccine 1980-1981*].

are vaccinated annually against seasonal influenza to 90 percent by 2020.⁷ However, as of 2008, only 45.5 percent of healthcare personnel received the influenza vaccine.⁸ By the 2011-12 influenza season, uptake of the influenza vaccine among healthcare personnel increased to an estimated 67 percent.⁹

Because the vaccination rate among healthcare personnel remained well below recommended levels, healthcare employers began to develop voluntary vaccination programs and incentive programs in order to encourage increased uptake among their personnel. In 2005, Virginia Mason Hospital became the “first non-profit hospital to implement a 100 percent staff influenza immunization goal and a fitness for duty requirement as an important patient safety effort to save lives.”¹⁰ Since then, hundreds of healthcare facilities across the country have implemented mandatory influenza vaccination programs, attaining coverage levels of up to 99 percent.¹¹ States have also recognized the need to increase influenza vaccination rates among healthcare personnel. As of the summer of 2011, twenty states have developed legislation or regulations requiring certain healthcare employers to implement influenza vaccination requirements for identified categories of healthcare personnel.¹²

Influenza vaccination programs and policies generally exempt those healthcare personnel who have a documented medical contraindication and sometimes also explicitly exempt those

⁷ *Immunization and Infectious Diseases*, HEALTHYPEOPLE.GOV (Aug. 28, 2013), <http://www.healthypeople.gov/2020/topicsobjectives2020/objectiveslist.aspx?topicId=23>.

⁸ *Id.*

⁹ *Influenza Vaccination Coverage Among Health-Care Personnel — 2011-12 Influenza Season, United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 28, 2012), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6138a1.htm> [hereinafter *Influenza Vaccination Coverage Among Health-Care Personnel*].

¹⁰ *Medical Firsts*, VIRGINIA MASON MEDICAL CENTER (2013), <https://www.virginiamason.org/MedicalFirsts>.

¹¹ Lynne V. Karanfil et al., *Championing Patient Safety through Mandatory Influenza Vaccination for All Healthcare Personnel and Affiliated Physicians*, 32 *INFECT. CONTROL HOSP. EPIDEMIOL.* 375–79 (2011); *Honor Roll for Patient Safety: Recognizing Outstanding Vaccination Efforts in Healthcare Settings*, IMMUNIZATION ACTION COALITION (2013), <http://www.immunize.org/honor-roll/>.

¹² Alexandra Stewart & Marisa Cox, *Influenza Vaccination of the Health Care Workforce: Developing a Model State Law*, DEP'T OF HEALTH POLICY, GEORGE WASHINGTON U. SCHOOL OF PUB. HEALTH AND HEALTH SERVICES (2011), <http://sphhs.gwu.edu/departments/healthpolicy/influenza/MODEL%20LAW%20REPORT.pdf>.

who hold a bona fide religious belief against receiving the vaccination. Workers who receive an exemption are typically required by their employer to wear a face mask during the entirety of the influenza season. However, healthcare personnel are not always pleased with this solution.

Influenza vaccination mandates implicate a variety of legal issues. Individual healthcare workers with religious objections to vaccination may choose to bring Title VII religious accommodation claims against their employers if an adverse employment action has been taken against them for refusing to comply with a mandatory influenza vaccination policy. Despite the controversy generated by such policies and the fact that dozens of healthcare workers have been terminated for refusing to comply, no court has yet issued an opinion applying Title VII religious accommodation law to a case involving a healthcare worker's refusal of an influenza vaccination.

In this article, I will delve into the issues surrounding Title VII religious accommodation claims brought by individual healthcare employees with religious objections to vaccination. In Part I, I will discuss the science and history of influenza vaccination and efforts to increase uptake. In Part II, I will analyze and discuss religious objections to vaccination and religious accommodation law as interpreted by the Supreme Court and lower courts. I will also discuss the ethical obligations of healthcare workers. Finally, in Part III, I will discuss how Title VII should be applied in such cases and how conflicts between religious beliefs and professional obligations should be handled. I will argue that healthcare facilities with mandatory influenza vaccination policies that require those who are exempted to wear a face mask will most likely not and should not be at risk of liability under Title VII. I will also argue that, because accommodating a healthcare worker's religious objection to vaccination by exempting him or her from an influenza vaccination requirement and instead requiring him or her to wear a face mask imposes an undue hardship on the employer, healthcare facilities with no religious exemptions to their

mandatory influenza vaccination policies will most likely not and should not be at risk of liability under Title VII. Finally, I will contend that, if an individual's religious views prevent him or her from receiving an influenza vaccination, he or she cannot sincerely swear to live up to the standards required by healthcare professions' codes of ethics and should therefore not enter a healthcare profession.

I. The History of Influenza Vaccination and Efforts to Increase Uptake

A. The Science

1. The Scope of the Problem

Influenza is a contagious virus that can cause mild to severe respiratory illness and, at times, result in death.¹³ Most experts think that influenza spreads primarily in an airborne manner by droplets made when people with the virus cough, sneeze, or talk. Less often, transmission occurs when a person touches a surface or object that has the virus on it and then touches his or her own mouth or nose. Symptoms generally start one to four days after the virus enters the body, although some people who are infected might never have symptoms. Most healthy adults become infectious one day *before* symptoms develop and remain infectious up to five to seven days after becoming sick. People who never have symptoms may still spread the virus to others.¹⁴

The CDC estimates that, on average, 200,000 influenza-associated hospitalizations and 36,000 deaths occur every year in the United States.¹⁵ Influenza kills more Americans than does any other vaccine-preventable disease.¹⁶ Influenza seasons vary significantly, though. For

¹³ *Flu Basics*, *supra* note 1.

¹⁴ *How Flu Spreads*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 12, 2013), <http://www.cdc.gov/flu/about/disease/spread.htm>.

¹⁵ Gregory Polard, *Valuing Influenza Vaccine: Medical, Economic, and Social Benefits*, 2009 CLIN. INFECT. DIS. 299–301 (2009).

¹⁶ *Id.*

example, during the 1990s, the average number of people hospitalized for influenza and its complications ranged from a low of 157,911 in 1990-91 to a high of 430,960 in 1997-98.¹⁷ The economic burden imposed by influenza is also significant. Estimates from 2003 put the cost of influenza epidemics to the U.S. economy at \$71-167 billion per year.¹⁸

Outbreaks of hospital-acquired (nosocomial)¹⁹ influenza, which pose a uniquely significant public health problem, have occurred for decades throughout the U.S.²⁰ Such outbreaks contribute substantially to patient morbidity and mortality and create a financial burden on healthcare systems.²¹ It is well known not only that healthcare personnel can transmit influenza to coworkers and patients before the onset of symptoms,²² but also that many healthcare personnel continue to work when they are mildly symptomatic or ill.²³ Nosocomial influenza is particularly serious because the patient populations in hospitals and other healthcare facilities are often more susceptible to risks of severe complications from the illness.²⁴ Rates of serious influenza-related illness and death are highest among infants, seniors over 65 years old, and anyone with a medical condition that places him or her at increased risk of having complications from influenza, such as pregnant women and those with underlying chronic cardiopulmonary, neuromuscular, and immunodeficient conditions.²⁵

¹⁷ *Seasonal Influenza-Associated Hospitalizations in the United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION (June 24, 2011), <http://www.cdc.gov/flu/about/qa/hospital.htm>.

¹⁸ *Influenza*, WORLD HEALTH ORG. (March 2003), <http://www.who.int/mediacentre/factsheets/2003/fs211/en/>.

¹⁹ *Prevention of Hospital-Acquired Infections*, *supra* note 4.

²⁰ *Call to Action*, *supra* note 5.

²¹ Jeffrey Starke, *Recommendation for Mandatory Influenza Immunization of All Health Care Personnel*, 126 PEDIATRICS 809-15, 809 (2010).

²² *Id.*

²³ *Id.* at 811.

²⁴ *People at High Risk*, *supra* note 2.

²⁵ Starke, *supra* note 21 at 810.

2. Methods of Preventing Influenza Transmission

Immunization is widely recognized by experts as the most effective way to prevent influenza outbreaks.²⁶ Influenza vaccines have been available in the U.S. since the 1940s²⁷ and, since 2010, the CDC has recommended that everyone over six months of age should be vaccinated.²⁸ Moreover, the CDC has recommended since 1981 that all healthcare personnel receive an annual influenza vaccination to protect themselves and vulnerable patients.²⁹ As part of the Healthy People program, HHS has set a goal of increasing the percentage of healthcare personnel who are vaccinated annually against seasonal influenza to 90 percent by 2020.³⁰ This goal is meaningful because 90 percent is approximately what portion of a community must be vaccinated in order for the community to achieve herd immunity.³¹ However, as of 2008, only 45.5 percent of healthcare personnel received the influenza vaccine.³² Uptake of the influenza vaccine among healthcare personnel increased to roughly 67 percent by the 2011-12 influenza season.³³

The effectiveness of influenza vaccines varies from season to season and from person to person.³⁴ Studies assessing the effectiveness of such vaccines are difficult to compare because study designs, outcomes measured, populations evaluated, and time periods assessed can all

²⁶ *Id.*

²⁷ Polard, *supra* note 15 at 299.

²⁸ Key Facts about Influenza (Flu) & Flu Vaccine, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 26, 2013), <http://www.cdc.gov/flu/keyfacts.htm> [hereinafter *Key Facts*].

²⁹ *Influenza Vaccine 1980-1981*, *supra* note 6.

³⁰ *Immunization and Infectious Diseases*, *supra* note 7.

³¹ Herd immunity (also called community immunity) is defined as a “situation in which a sufficient proportion of a population is immune to an infectious disease (through vaccination and/or prior illness) to make its spread from person to person unlikely. Even individuals not vaccinated (such as newborns and those with chronic illnesses) are offered some protection because the disease has little opportunity to spread within the community.” Alexandra Stewart et al., *Mandatory Vaccination of Health-Care Personnel: Good Policy, Law, and Outcomes*, 53 JURIMETR. J. 341-59, 343 (2013).

³² *Immunization and Infectious Diseases*, *supra* note 7.

³³ *Influenza Vaccination Coverage Among Health-Care Personnel*, *supra* note 9.

³⁴ *Vaccine Effectiveness - How Well Does the Flu Vaccine Work?*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Nov. 7, 2013), <http://www.cdc.gov/flu/about/qa/vaccineeffect.htm>.

vary.³⁵ However, some generalizations can be made. Recent studies conducted by the CDC show that vaccination can reduce the risk of influenza illness by about 60 percent among the overall population during seasons when most circulating influenza viruses are like the viruses the vaccine is designed to protect against.³⁶ Among healthy adults like healthcare personnel, though, annual immunization with a vaccine antigenically well matched to circulating strains reduces laboratory-confirmed influenza cases by 70 to 90 percent.³⁷

Although vaccination itself cannot cause influenza, some side effects can be associated with the vaccine.³⁸ However, these side effects are generally mild and short-lived. The shot, which contains inactivated viruses, may sometimes cause minor soreness, redness, or swelling where the shot was given; low grade fever; or aches.³⁹ The nasal spray vaccine, which contains weakened viruses, may sometimes cause runny nose, headache, sore throat, or cough in adults.⁴⁰ While almost all people who receive influenza vaccines have no serious side effects, on rare occasions, vaccination can cause serious problems, such as severe allergic reactions.⁴¹ There is a small possibility that receiving the inactivated or weakened influenza virus could be associated with Guillain-Barré Syndrome—no more than one or two cases per million people vaccinated—but this is much lower than the risk of severe complications from influenza itself.⁴²

Another method used to prevent influenza transmission, particularly in healthcare settings, is wearing surgical face masks. Face masks may reduce the transmission of influenza by

³⁵ *Id.*

³⁶ *Id.*

³⁷ Starke, *supra* note 21 at 810.

³⁸ *Key Facts*, *supra* note 28.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 2013-2014 Seasonal Influenza Vaccine Safety, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 27, 2013), <http://www.cdc.gov/flu/protect/vaccine/general.htm>.

protecting a healthy wearer from acquiring the virus or by obstructing the viral shedding from an infected wearer.⁴³ Face masks may also reduce direct transmission of the virus by functioning as a barrier to touching one's own mouth and nose.⁴⁴ However, some hypothesize that wearing a face mask may actually increase hand-to-mouth and hand-to-nose touching because wearers often readjust their masks. The effectiveness of face masks is likely impacted by a variety of compliance issues.⁴⁵ Another practical limitation of face masks is that they are not designed to be tight-fitting, so "facial seal leakage" affects their performance.⁴⁶

Despite face masks having been in use for more than a century,⁴⁷ there remains a lack of scientific evidence about their protective effect against the transmission of influenza.⁴⁸ While there is some experimental evidence that face masks should be able to reduce infectiousness under controlled conditions, there is very little evidence on whether this translates into effectiveness in natural settings.⁴⁹ In six studies of face mask use and the transmission of influenza in healthcare settings conducted around the world, study designs, participants, interventions and reported outcome measures varied significantly.⁵⁰ The findings of some of these studies include: "No significant differences between mask group and control group," "No significant protective effect of face masks," and "No significant differences by mask use."⁵¹ Furthermore, studies have suggested that the influenza virus can survive in aerosol particles that

⁴³ Titus Daniels & Thomas Talbot, *Unmasking the Confusion of Respiratory Protection to Prevent Influenza-Like Illness in Crowded Community Settings*, 201 J. INFECT. DIS. 483–85, 484 (2010).

⁴⁴ *Id.*

⁴⁵ B J Cowling et al., *Face masks to prevent transmission of influenza virus: a systematic review*, 138 EPIDEMIOL. INFECT. 449–456, 454 (2010).

⁴⁶ C Makison Booth et al., *Effectiveness of surgical masks against influenza bioaerosols*, 84 J. HOSP. INFECT. 22–26, 23 (2013).

⁴⁷ *Id.* at 22.

⁴⁸ *Id.* at 23.

⁴⁹ Cowling et al., *supra* note 45, citing D.F. Johnson, et al., *A Quantitative Assessment of the Efficacy of Surgical and N95 Masks to Filter Influenza Virus in Patients with Acute Influenza Infection*, 49 CLIN. INFECT. DIS. 275-77 (2009).

⁵⁰ Cowling et al., *supra* note 45 at 450.

⁵¹ *Id.* at 451.

are able to bypass or penetrate a face mask.⁵² Overall, there is little evidence to support the effectiveness of face masks to reduce the risk of influenza infection.⁵³ At best, this is simply a gap in the scientific literature that requires further study. At worst, it serves as an indication that face masks are not a reliable method of preventing the transmission of influenza.

B. Mandatory Vaccination Regimes

1. General History and Constitutionality

Although society is still trying to determine how best to respond to infectious diseases and epidemics, bearing in mind that public health measures can sometimes conflict with personal freedoms, the issue is not a new one. Historically, quarantine was the typical, accepted method of preventing the spread of infectious disease, and it is still occasionally used today. However, the invention of vaccines proved to be a pivotal advancement for public health.⁵⁴

In 1905, the Supreme Court held in *Jacobson v. Massachusetts* that the states' general police powers are sufficiently comprehensive to overcome an individual's Due Process claim that his personal liberty interests were unconstitutionally invaded by a smallpox vaccination mandate.⁵⁵ This mandate, which required adults to be vaccinated for smallpox or pay a five dollar fine, went into effect after a smallpox outbreak in the Northeast killed hundreds and infected thousands.⁵⁶ Reverend Henning Jacobson refused the vaccination, citing concerns over the vaccination's safety and claiming that he and his son had previously experienced adverse reactions to vaccinations, and subsequently refused to pay the fine.⁵⁷ Writing for a 7-2 majority, Justice Harlan explained that the Constitution's guarantee of liberty "does not import an absolute

⁵² Makison Booth et al., *supra* note 46 at 25.

⁵³ Cowling et al., *supra* note 45 at 455.

⁵⁴ *Vaccine History - Vaccine Safety*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 8, 2011), http://www.cdc.gov/vaccinesafety/vaccine_monitoring/history.html.

⁵⁵ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

⁵⁶ 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. UNIV. LAW REV. 1715-49, 1718-19 (2011).

⁵⁷ *Id.* at 1719.

right in each person, to be, at all times and in all circumstances wholly free from restraint.”⁵⁸ The Court held that protection of the public welfare warranted an infringement on Jacobson’s liberty interest.⁵⁹ The public health and safety interest was found to be decisive in upholding mandatory vaccination. *Jacobson* remains the primary constitutional basis for most mandatory vaccination legislation.

2. Mandatory Influenza Vaccination Regimes

Despite recommendations that all healthcare personnel be vaccinated against influenza, many remained and continue to remain reluctant. Almost all studies on the subject have found that, among healthcare workers, physicians have the highest vaccination rates.⁶⁰ Non-physician healthcare workers consistently have lower vaccination rates and being a nurse has been shown to be negatively associated with vaccine uptake.⁶¹

In an effort to raise the vaccination rate of their employees up to recommended levels, many healthcare employers began to implement voluntary vaccination programs.⁶² These programs often included free vaccinations administered onsite, incentives like free meals, and stickers on name badges identifying who was vaccinated.⁶³ These voluntary programs resulted in modest increases in vaccination rates, but they fell far short of their goal of a 90 to 100 percent uptake rate.⁶⁴

In 2005, Virginia Mason Hospital in Seattle became the “first non-profit hospital to implement a 100 percent staff influenza immunization goal and a fitness for duty requirement as

⁵⁸ *Jacobson*, 197 U.S. at 26.

⁵⁹ Horowitz, *supra* note 56.

⁶⁰ Claire Bellia et al., *Healthcare worker compliance with seasonal and pandemic influenza vaccination*, 7 INFLUENZA OTHER RESPIR. VIRUSES 97–104, 98 (2013).

⁶¹ *Id.*

⁶² Stewart et al., *supra* note 31 at 343.

⁶³ *Id.* at 343–44.

⁶⁴ *Id.* at 344.

an important patient safety effort to save lives.”⁶⁵ Under this fitness for duty requirement, all staff members are required to show proof of influenza vaccination or face termination.⁶⁶ Only those who can provide documentation of a medical contraindication or whose objection is based on a bona fide religious belief are exempt from the policy.⁶⁷ Unvaccinated personnel must wear face masks while at the hospital.⁶⁸ Employees who fail to comply by a specified date are placed on unpaid leave, but roughly 99 percent of staff complies.⁶⁹

Since Virginia Mason Hospital implemented its mandatory influenza vaccination policy in 2005, hundreds of hospitals and healthcare facilities across the country have implemented similar programs, also attaining coverage levels of up to 99 percent.⁷⁰ According to a CDC survey conducted in 2011, more than 400 U.S. hospitals require influenza vaccinations for their employees.⁷¹ Like Virginia Mason’s policy, other hospitals’ policies usually require healthcare workers who have patient contact to get vaccinated or wear face masks during the entirety of the influenza season, and under many of the policies refusal results in termination.⁷² According to the Associated Press, twenty-nine hospitals have already terminated unvaccinated employees.⁷³ All of these mandatory influenza vaccination policies allow exemptions for employees who can provide documentation of a medical contraindication. Many of these policies also exempt individuals whose objection is based on a bona fide religious belief, just as Virginia Mason’s policy does. Despite the availability of these exemptions, a number of hospitals’ mandatory

⁶⁵ *Medical Firsts*, *supra* note 10.

⁶⁶ Stewart et al., *supra* note 31 at 344.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Lynne V. Karanfil et al. *supra* note 11.

⁷¹ Karen Cheung-Larivee, *Mandatory Flu Vaccinations: 5 Points that Frame the Debate*, FIERCE HEALTHCARE (Jan. 15, 2013), <http://www.fiercehealthcare.com/story/mandatory-flu-vaccinations-5-points-frame-debate/2013-01-15>.

⁷² *Id.*

⁷³ *Id.*

influenza vaccination policies, including Virginia Mason’s policy, have resulted in legal challenges.⁷⁴

Many states have also recognized the need to increase influenza vaccination rates among healthcare personnel. During the H1N1 outbreak of 2009, New York became the first state to mandate influenza vaccination for all healthcare workers in hospitals, outpatient clinics, and home care services.⁷⁵ However, amidst opposition and a national vaccine shortage, New York rescinded the mandate after only two months.⁷⁶ As of the summer of 2011, twenty states had enacted laws requiring healthcare facilities to develop influenza vaccination requirements for their workforce.⁷⁷ Rhode Island has the only true state mandate currently in effect, though.⁷⁸ In October 2012, the Rhode Island Department of Health amended its regulations to require healthcare personnel employed by licensed healthcare facilities to either receive an annual influenza vaccination or wear a face mask during direct contact with patients when the Director of the Department of Health declares that influenza is widespread.⁷⁹ This regulation also resulted in a legal challenge.⁸⁰

II. Religious Objections to Influenza Vaccination

A. Why Individuals Object

Individuals refuse influenza vaccination for a variety of reasons. Many of the reasons commonly cited are rooted in misconceptions about the vaccine: “The vaccine does not work,”

⁷⁴ Stewart et al., *supra* note 31 at 345.

⁷⁵ David B Banach et al., *Support for mandatory health care worker influenza vaccination among allied health professionals, technical staff, and medical students*, 41 AM. J. INFECT. CONTROL 354–356, 354 (2013).

⁷⁶ *Id.*

⁷⁷ The twenty states are: Alabama, Arkansas, California, District of Columbia, Illinois, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Virginia. Stewart and Cox, *supra* note 12.

⁷⁸ Lisa H. Randall, Eileen A. Curran & Saad B. Omer, *Legal considerations surrounding mandatory influenza vaccination for healthcare workers in the United States*, 31 VACCINE 1771–1776, 1771 (2013).

⁷⁹ Stewart and Cox, *supra* note 12.

⁸⁰ Stewart et al., *supra* note 31.

“The vaccine causes the flu,” “I have an allergy to eggs,” “I cannot get the vaccine because I am pregnant or have an underlying medical condition or because I live with an immunocompromised person,” or “I never get the flu/I am healthy.”⁸¹ Others cite religious and philosophical reasons for their objection to influenza vaccination. Religious concerns about vaccination have existed since a smallpox vaccine was developed in 1796, with some individuals objecting to and declining vaccination as contrary to “God’s will.”⁸²

Among the few religious denominations with an absolute objection to vaccines are the First Church of Christ, Scientist (Christian Scientists) and several other Christian churches that rely on faith healing. Mary Baker Eddy, who in 1879 founded the Church of Christ, Scientist, taught that disease is cured or prevented by prayer that affirms human perfection as God’s child and denies the reality of disease, which is simply a manifestation of the devil’s lies.⁸³ This Christian Science principle of healing through focused prayer is featured in Eddy’s canon, *Science and Health with Key to the Scriptures*.⁸⁴ Vaccines are therefore considered unnecessary.⁸⁵ Other Christian denominations or churches which hold core beliefs that healing occurs through faith alone, with active avoidance of medical care, include Church of the First Born, End Time Ministries, Faith Assembly, Faith Tabernacle, and First Century Gospel Church.⁸⁶

Most Christian denominations have no scriptural or canonical objection to the use of vaccines per se. These include Roman Catholicism, Eastern Orthodox and Oriental Orthodox

⁸¹ Talbot TR & Talbot H, *Influenza prevention update: Examining common arguments against influenza vaccination*, 309 JAMA 881–882 (2013).

⁸² John D. Grabenstein, *What the World’s religions teach, applied to vaccines and immune globulins*, 31 Vaccine, 2011–23, 2012 (2013).

⁸³ *Id.* at 2015, citing M B Eddy. *Science and health with key to the scriptures*. Boston: Church of Christ, Scientist; (1895), available at www.christianscience.com/read-online.

⁸⁴ *Id.*

⁸⁵ Despite Christian Scientists’ belief in spiritual healing of disease, the founder of the Church said, “Rather than quarrel over vaccination, I recommend, if the law demand, that an individual submit to this process, that he obey the law, and then appeal to the gospel to save him from bad physical results.” *Id.*

⁸⁶ Vincent Ianelli, *Religious Exemptions to Vaccines*, ABOUT.COM (Aug. 31, 2013) <http://pediatrics.about.com/od/immunizations/a/religious-vaccine-exemptions.htm>.

Churches, Amish, Anglican, Baptist, the Church of Jesus Christ of Latter-day Saints, Congregational, Episcopalian, Lutheran, Methodist (including African Methodist Episcopal), Pentecostal, Presbyterian, and Seventh-Day Adventist Church.⁸⁷

However, a variety of scriptural passages have been interpreted by a minority of Christians as contrary to vaccination.⁸⁸ Some cite I Corinthians 3:16 and 6:19 when declining vaccination, saying that life is a gift from God and the body is a work of divine creation to be revered as a temple of God.⁸⁹ I Corinthians 3:17 and 2 Corinthians 7:1 are also cited, saying that to keep the body holy and clean from blemish, we must not defile the body. Some believe that injecting a vaccine into the body would be a violation of these biblical teachings.⁹⁰ Other passages from the New Testament which are cited in declining vaccination include Matthew 10:7-8 (“And proclaim as you go, saying, ‘The kingdom of heaven is at hand.’ Heal the sick, raise the dead, cleanse lepers, cast out demons. You received without paying; give without pay.”), Matthew 15:13 (“He answered, ‘Every plant that my heavenly Father has not planted will be rooted up.’”), Mark 2:17 (“On hearing this, Jesus said to them, ‘It is not the healthy who need a doctor, but the sick. I have not come to call the righteous, but sinners.’”), and Mark 5:34 (“And he said to her, ‘Daughter, your faith has made you well; go in peace, and be healed of your disease.’”).⁹¹

While vaccination is not prohibited by Amish or Hutterite religious doctrine, vaccine acceptance varies from district to district. Those that decline vaccination typically do so based on the social tradition of rejecting modernity.⁹² Some members of Dutch reformed congregations (Christian denominations) choose to forgo vaccination rather than making themselves less

⁸⁷ Grabenstein, *supra* note 82 at 2015.

⁸⁸ *Id.*

⁸⁹ *Id.* at 2013.

⁹⁰ *Biblical Support for Not Vaccinating Our Children*, JESUS IS SAVIOR, http://www.jesus-is-savior.com/Health_Concerns/Vaccines/biblical_support-not_vaccinating.htm.

⁹¹ Grabenstein, *supra* note 82 at 2013.

⁹² *Id.* at 2015.

dependent on God or to avoid interfering with divine providence.⁹³ The Jehovah’s Witnesses, a Christian denomination whose members often refuse transfusions of whole blood and certain blood components, used to abstain from vaccination based on the same scriptural passages.⁹⁴ However, this doctrine was changed in 1952; those passages are no longer thought to apply to vaccination.⁹⁵

Judaism and Islam are generally acknowledged to have clear positions in support of vaccination.⁹⁶ Jewish vaccine decliners are more likely to cite concerns about vaccine safety than to invoke a specific religious doctrine that recognized Jewish scholars have failed to consider. Those scholars have rejected arguments that vaccination interferes with divine providence.⁹⁷ Opposition to vaccination among certain Muslim communities has stemmed primarily from safety concerns and social issues.⁹⁸ Jainism, Buddhism, and Hinduism (linked via *ahimsa*), generally recognize the need to sustain human life and regretfully accept the use of vaccines.⁹⁹

It would seem that the instances of personal objections to vaccination that are properly theological in nature are relatively few, and that the preponderance might more accurately be defined as philosophical, traditional, social, or simply personal choice.¹⁰⁰ Researchers have concluded that the bulk of such objections reflect individuals’ concerns about vaccine safety, not matters of theology.¹⁰¹ Although inquiry into whether an individual’s objection to vaccination is truly “religious” can be relevant to the analysis of his or her legal claim (including the analysis of

⁹³ *Id.*

⁹⁴ By abstaining from blood, Witnesses express their faith that only the shed blood of Jesus can redeem them and save their life. This interpretation derives from several scriptural passages, including Genesis 9:3-4, Leviticus 17:10-14, and Acts of the Apostles 15:28-29. *Id.*

⁹⁵ *Id.* at 2016.

⁹⁶ Notable passages from the Hebrew Bible include Genesis 4:9; Leviticus 11:7-8, 11:10-11, 19:16, and 19:19; Deuteronomy 4:9, 14:7-8, 22:1-4, and 22:8; and Proverbs 23:12-13. Notable passages from the Qur’an include 2:173, 5:3, 5:4, 16:81, 16:116, and 30:30. *Id.* at 2013.

⁹⁷ *Id.* at 2014.

⁹⁸ *Id.* at 2016.

⁹⁹ *Id.* at 2019.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Title VII religious accommodation claims), standards for and methods of assessing the sincerity of a plaintiff's alleged religious objection to vaccination will not be discussed in this article.

B. Types of Legal Challenges

Influenza vaccination mandates invoke and implicate a variety of legal issues, including state and federal constitutional law, the applicability of state and federal statutes, and the operation of state laws governing contracts and torts.¹⁰² Areas of constitutional law pertinent to healthcare worker vaccination mandates include substantive due process, equal protection, the establishment and free exercise clauses, procedural due process, and state constitutions.¹⁰³ Statutes pertinent to such mandates include the ADA, the Civil Rights Act of 1964 (Title VII), state civil rights statutes, HIPAA, OSHA (federal and state), NLRA, Medicare and Medicaid, licensing of professionals and facilities, and emergency authority.¹⁰⁴ Other relevant areas of law include union contracts, good faith and fair dealing, wrongful discharge, battery and invasion of privacy, institutional negligence, and public nuisance.¹⁰⁵

When the Rhode Island Department of Health instituted its influenza vaccination mandate for healthcare workers in 2012, the Service Employees International Union (SEIU) initiated a civil action in federal district court.¹⁰⁶ The SEIU claimed the regulations violated their members' Due Process rights because: (1) the requirement for unvaccinated healthcare personnel to wear a surgical face mask impermissibly interfered with their right to pursue their profession,¹⁰⁷ (2) the regulations are not rationally related to a legitimate state interest, and (3) the regulations fail to comply with procedural Due Process requirements. The SEIU also argued: (4) the regulations

¹⁰² Lisa H. Randall, Eileen A. Curran & Saad B. Omer, *Legal considerations surrounding mandatory influenza vaccination for healthcare workers in the United States*, 31 *VACCINE* 1771–76, 1772 (2013).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Stewart et al., *supra* note 31 at 353.

¹⁰⁷ *Id.*

violate the Equal Protection Clause; (5) the regulations are preempted by the NLRA; and (6) the regulations violate HIPAA.¹⁰⁸ Although this case resulted in a stipulation of dismissal on March 5, 2013, it is inevitable that healthcare workers and unions will continue to challenge regulations and policies such as Rhode Island's.

When Virginia Mason Hospital introduced its mandatory influenza vaccination policy, the Washington State Nurses Association filed an unfair labor charge alleging that the hospital failed to bargain in good faith regarding implementation of the policy.¹⁰⁹ The union alleged that the policy: (1) was a mandatory subject of bargaining; (2) was implemented unilaterally, without prior notice to the union; and (3) was implemented without affording the union an opportunity to bargain over the policy and its effects.¹¹⁰ The U.S. Court of Appeals for the Ninth Circuit upheld an arbitrator's decision that the hospital's unilateral adoption of the mandatory influenza vaccination policy without bargaining over it with union representatives violated the collective bargaining agreement.¹¹¹

C. Title VII Religious Accommodation Law

§ 701(j) of the Civil Rights Act of 1964 affirmatively requires an employer to accommodate an employee's religious needs.¹¹² However, accommodation is not required if the employer can demonstrate that "he is unable to reasonably accommodate... an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 345.

¹¹⁰ *Id.*

¹¹¹ *Va. Mason Hosp. v. Wash. State Nurses Ass'n*, 511 F.3d 908 (9th Cir. 2007).

¹¹² 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) (1994)).

[his] business.”¹¹³ The U.S. Supreme Court has twice interpreted § 701(j), and both times it has narrowly defined an employer’s obligation to accommodate an employee’s religious needs.¹¹⁴

1. *Trans World Airlines, Inc. v. Hardison*

Larry Hardison worked as a clerk in a TWA maintenance and overhaul facility’s supply department in Kansas City, Missouri. The department’s work was considered critical to the operation of the facility and it was open 24 hours per day all year. The facility’s employees were covered by a collectively bargained seniority system. Hardison refused to work on Saturdays, his Sabbath, due to his membership in the Worldwide Church of God. When he chose to transfer to a new position, he did not have sufficient seniority to take Saturdays off. TWA allowed the union to seek a change in work assignments, but the union refused because of Hardison’s lack of seniority under the collective bargaining agreement. TWA also tried to place Hardison in another job, but was not able to. Hardison was ultimately terminated for his refusal to work on Saturdays. He then sued TWA and the union for religious discrimination in violation of Title VII.

TWA argued that supply functions essential to airline operations would be compromised if Hardison was absent on Saturdays. In addition, TWA contended that replacing Hardison with an employee from another department would compromise other operations and that employing someone not scheduled to work on Saturday would require the payment of premium wages. The defendants prevailed at the district court, but the court of appeals reversed.

In 1977, the Supreme Court sided with the district court and asserted that each of the suggested accommodations imposed an undue hardship upon TWA. The Court defined “undue hardship” under § 701(j) as requiring an employer to bear anything “more than a de minimis

¹¹³ *Id.*

¹¹⁴ *See* *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986).

cost.”¹¹⁵ The primary focus of the Court’s opinion, though, was the inviolability of the collective bargaining agreement. The Court held that the duty to accommodate religious beliefs and practices does not override a company’s obligation to comply with the seniority provisions of a valid collective bargaining agreement.¹¹⁶ The Court also addressed the other accommodations suggested by the court of appeals and held that each entailed more than a de minimis cost to TWA. Allowing Hardison to work a four day week and replacing him on Saturdays with either supervisory personnel or employees from other departments would lead to lost efficiency and therefore constitute more than a de minimis cost.¹¹⁷ Similarly, replacing Hardison with another employee not scheduled to work would require paying approximately \$150 in premium wages, which would constitute more than a de minimis cost.¹¹⁸ In addition, requiring other employees to replace Hardison on Saturdays would constitute discrimination against other employees, which would be more than a de minimis cost.¹¹⁹

Trans World Airlines, Inc. v. Hardison laid out a standard for de minimis cost that encompasses quantifiable monetary costs, less quantifiable hardships imposed on employers, adverse impacts on other employees, and violations of a collective bargaining agreement. It is of note that the Court considered a monetary cost of only \$150 to be an undue hardship on a large employer such as TWA. This standard for determining if an accommodation constitutes an undue hardship on an employer sets the bar very low.

¹¹⁵ “To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship.” *Hardison*, 432 U.S. at 84.

¹¹⁶ *Id.* at 79-83.

¹¹⁷ *Id.* at 84.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 84-85.

2. *Ansonia Board of Education v. Philbrook*

Nine years after *Trans World Airlines, Inc. v. Hardison* was decided, the Supreme Court narrowly interpreted § 701(j) once again in *Ansonia Board of Education v. Philbrook*.¹²⁰ This case is best known for holding that, “where the employer has already reasonably accommodated the employee’s religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee’s alternative accommodations would result in undue hardship.”¹²¹

Ronald Philbrook was a high school teacher who belonged to the Worldwide Church of God. His religious beliefs prohibited him from working on six school days coinciding with holy days. The collective bargaining agreement between the board of education and the teacher’s union provided that teachers could take only three days of leave for “mandated religious observance” and three days of sick leave for necessary personal business (which specifically excluded religious leave) each year.¹²² Philbrook offered to use his personal leave and reimburse the school for the cost of a substitute teacher for the three days at issue. The school board refused and insisted that Philbrook take leave without pay for those three days. Philbrook then brought suit under Title VII.¹²³

The Supreme Court held that it was reasonable for the school board to require an employee to take leave without pay for religious absences in excess of three days each year.¹²⁴ This accommodation was deemed reasonable even though it would impose a financial cost on Philbrook, despite the fact that alternatives less costly to Philbrook were available. In addition, the Court held that the school board was not required to accept any of Philbrook’s recommended

¹²⁰ *Ansonia*, 479 U.S. 60.

¹²¹ *Id.* at 68.

¹²² *Id.* at 63-64.

¹²³ *Id.* at 64-65.

¹²⁴ *Id.* at 70-71.

alternatives because Title VII only compels an employer to offer an employee some kind of reasonable accommodation, not the best or most desirable accommodation.¹²⁵

The Court remanded Philbrook's case to the district court for further factual inquiry into whether the school board offered paid, personal leave for all reasons except religious observance. The Court noted that, if so, "[s]uch an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness."¹²⁶ The district court ultimately found that the school board had not deviated from its written personal leave policy and that the application of the policy to Philbrook was reasonable and not discriminatory.¹²⁷

D. Lower Courts Refine the Meaning of Undue Hardship: Safety Risks

Decisions from the lower courts are helpful when attempting to determine if an accommodation would in fact impose an undue hardship on an employer. While *Hardison's* de minimis cost standard for determining if an accommodation imposes an undue hardship on an employer seems very pro-defendant, there is extensive case law benefiting plaintiffs demanding that proof of a hardship be concrete, rather than speculative. This requirement was articulated by the Sixth Circuit when it declared that it will be "somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice."¹²⁸

Examples of hardships that were held to be too speculative include: a "hypothetical morale problem" that would ostensibly result from asking employees to voluntarily trade shifts with the plaintiff;¹²⁹ an employer's defense that it needed the plaintiff-employee to input payroll data on

¹²⁵ *Id.* at 68-69.

¹²⁶ *Id.* at 71.

¹²⁷ *Philbrook v. Ansonia Bd. of Educ.*, 925 F.2d 47, 54 (2d Cir.), *cert. denied*, 501 U.S. 1218 (1991).

¹²⁸ *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir.1975). *See also* *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085-86 (6th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988).

¹²⁹ *Opuku-Boateng v. State of Cal.*, 95 F.3d 1461, 1473-74 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1819 (1997).

Friday afternoons (during the employee’s Sabbath) when the employer failed to present proof that this task needed to be performed on Friday afternoons;¹³⁰ a school board’s defense, which was the “product of hindsight created in preparation for this trial,” that students’ education would suffer if a teacher was permitted religious observance;¹³¹ and a food service company’s defense that its customers would “boycott” its cafeteria if its employees continued to say “God bless you” or “Praise the Lord” to customers in the cafeteria line.¹³² A common argument made by defendant-employers is that they cannot accommodate employees’ religious needs because doing so would set a precedent which would cause accommodation requests to soar among other employees. Many courts have held that this argument against opening a floodgate of accommodation requests cannot succeed without concrete evidence; hypotheses are not a substitute for proof.¹³³

The same Sixth Circuit case, *Draper*, that articulated the requirement that hardships not be speculative or “hypothetical” also noted that “safety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer’s business.”¹³⁴ Although the defendant in that case failed to show that the plaintiff could not have been accommodated without jeopardizing the safety of his workplace, the court emphasized that “Title VII does not require that safety be subordinated to the religious beliefs of an employee.”¹³⁵ While employers’ arguments about safety risks must be grounded in fact and not speculation, the importance of safety considerations has been widely acknowledged by courts.

¹³⁰ *Gordon v. MCI Telecommunications Corp.*, 59 FEP 1363, 1367 (S.D.N.Y. 1992).

¹³¹ *Edwards v. City of Norton, Va.*, 483 F. Supp. 620, 627 (W.D. Va. 1980), *judgment vacated in part on other grounds*, 658 F.2d 951 (4th Cir. 1981).

¹³² *Banks v. Service America Corp.*, 952 F. Supp. 703, 10 (D. Kan. 1996).

¹³³ *Nottelson v. Smith Steel Workers*, 643 F.2d 445, 452 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981); *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 961 (8th Cir. 1979); *Burns v. S. Pac. Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

¹³⁴ *Draper*, 527 F.2d at 520-21.

¹³⁵ *Id.*

Lower courts have helped to clarify the difference between concrete and speculative hardships involving safety concerns.

For example, in *Bhatia v. Chevron U.S.A.*, the Ninth Circuit held that an employer need not prove that an accommodation would actually cause injury; “the increased risks were sufficient.”¹³⁶ In *Bhatia*, the plaintiff, who worked as a machinist for Chevron, believed that shaving his beard was contrary to the Sikh religion. Chevron instituted a policy requiring machinists whose duties involved potential exposure to toxic gas to shave any facial hair that prevented them from achieving a gas-tight seal when wearing a respirator.¹³⁷ Since assignments were unpredictable, Chevron required all machinists to be able to use a respirator safely. Upon refusing to shave his beard, Bhatia was suspended without pay and then placed in a lower-paying job that did not expose him to gas. The Ninth Circuit held that allowing Bhatia to continue working as a machinist on assignments where he would be exposed to gas would be an undue hardship because Chevron “would risk liability” under California occupational safety standards.¹³⁸ On the other hand, retaining Bhatia as a machinist and giving him only assignments which did not involve exposure to toxic gas would impose two different undue hardships on Chevron: (1) Chevron would have to overhaul its unpredictable system of work assignments, and (2) Chevron would have to require Bhatia’s co-workers to perform his share of dangerous work.¹³⁹ Affirming summary judgment for Chevron, the Ninth Circuit determined that “Title VII does not require Chevron to go that far.”¹⁴⁰ The increased risks of being found in

¹³⁶ *Finnie v. Lee County, Miss.*, 907 F. Supp. 2d 750, 778 (N.D. Miss. 2012) (*citing* *Bhatia v. Chevron U.S.A.*, 734 F.2d 1382, 1384 (9th Cir. 1984)).s

¹³⁷ *Finnie*, 907 F. Supp. 2d at 778 (*citing* *Bhatia*, 734 F.2d at 1382).

¹³⁸ *Finnie*, 907 F. Supp. 2d at 778 (*citing* *Bhatia*, 734 F.2d at 1384).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

violation of state law or of causing injury from exposure to toxic gas were sufficient to constitute an undue hardship; Chevron was not required to prove that these risks would be realized.¹⁴¹

The Second Circuit, relying in part on *Bhatia*, tackled a similar case involving an employer's hard hat policy.¹⁴² In *Kalsi v. New York City Transit Authority*, the plaintiff's religious beliefs as a Sikh required him to wear a turban at all times. The New York Transit Authority fired Kalsi from his job as a subway car inspector because he refused to comply with its requirement that all inspectors wear hard hats. First, Kalsi argued that he should be allowed to perform his job, with some modifications, without a hard hat. He proposed that he work only inside subway cars (where there is less risk of head injury) and that he take unpaid breaks if his team was performing tasks for which the transit authority considered hard hats most necessary.¹⁴³ Kalsi's expert acknowledged that accommodating Kalsi in this manner would increase his risk of head injury. However, he opined that if Kalsi wore a turban, he would be unlikely to experience a "catastrophic" injury.¹⁴⁴ Kalsi's expert also made suggestions about how workplace hazards could be avoided so that hard hats would not be necessary. The court granted summary judgment for the transit authority on undue hardship grounds, reasoning that "Title VII does not require employers to absorb the cost of all less than catastrophic physical injuries to their employees in order to accommodate religious practices."¹⁴⁵ The risks inherent in the proposed accommodation included not only the increased risk of personal injury to Kalsi, but also the risk of injury to Kalsi's co-workers who might be called on to rescue him or who might become hurt if he were incapacitated.¹⁴⁶ The court also rejected Kalsi's suggestions about possible

¹⁴¹ Finnie, 907 F. Supp. 2d at 778.

¹⁴² Finnie, 907 F. Supp. 2d at 778 (*citing* *Kalsi v. N.Y.C. Transit Auth.*, 62 F. Supp. 2d 745 (E.D.N.Y. 1998), *aff'd mem.*, 189 F.3d 461 (2d Cir. 1999) (affirming "for substantially the reasons stated by the district court").

¹⁴³ Finnie, 907 F. Supp. 2d at 778-79 (*citing* *Kalsi*, 62 F. Supp. 2d at 759).

¹⁴⁴ Finnie, 907 F. Supp. 2d at 779 (*citing* *Kalsi*, 62 F. Supp. 2d at 759-60).

¹⁴⁵ Finnie, 907 F. Supp. 2d at 779 (*citing* *Kalsi*, 62 F. Supp. 2d at 760).

¹⁴⁶ *Id.*

modifications to the work environment because those modifications would have involved more than a de minimis cost.¹⁴⁷

These Ninth Circuit and Second Circuit cases were both cited by a 2012 case from Mississippi involving a juvenile detention officer's refusal to comply with a county's pants-only uniform policy.¹⁴⁸ In *Finnie v. Lee County, Miss.*, a female juvenile detention officer believed that wearing pants violated her Pentecostal faith and wore an ankle-length skirt instead, in violation of the uniform policy. She was ultimately terminated because, according to the county, granting her an exemption from the "no skirts" policy would create a risk to safety and security due to Finnie's inability to perform certain defense-tactic maneuvers.¹⁴⁹ The court granted summary judgment for the county, holding that offering Finnie an exemption to the "no skirts" policy would impose an undue hardship as a matter of law.¹⁵⁰ The court noted that, to carry a burden of showing undue hardship, the county did not even need to prove that a skirt had actually caused safety and security problems, but only had to show safety and security risks.¹⁵¹

E. Title VII and Influenza Vaccination Refusal by Healthcare Workers

No court has yet issued an opinion applying Title VII religious accommodation law to a case involving a healthcare worker's refusal of an influenza vaccination. This is somewhat surprising given the controversy healthcare facilities' mandatory influenza vaccination policies have generated, and the fact that at least twenty-nine hospitals have terminated unvaccinated employees.¹⁵² Stories of such discharges have repeatedly made the news, like one from January 2012 reporting that an Indiana hospital "fired eight employees, including at least three veteran

¹⁴⁷ *Id.*

¹⁴⁸ *Finnie*, 907 F. Supp. 2d 750.

¹⁴⁹ *Id.* at 777, 780.

¹⁵⁰ *Id.* at 781.

¹⁵¹ *Id.*

¹⁵² *Cheung-Larivee*, *supra* note 71.

nurses, after they refused mandatory flu shots”¹⁵³ and another from January 2013 reporting that, in the previous “two months, at least 15 nurses and other hospital staffers in four states [had] been fired for refusing, and several others [had] resigned.”¹⁵⁴

Two actions have been brought alleging religious discrimination in violation of Title VII in relation to mandatory influenza vaccination policies, but neither of these cases afforded courts an opportunity to address the substantive issues. One case, *Edwards v. Elmhurst Hospital Center*, was dismissed because the plaintiff, proceeding *pro se*, failed to allege that the defendant took any adverse employment action against him based on his religious objection to influenza vaccination.¹⁵⁵ Edwards claimed that Elmhurst Hospital Center discriminated against him on the basis of his religion when it informed him in September 2009 that, as a healthcare worker, he was required by the New York State Department of Health to receive an influenza vaccination as a condition of his employment. Edwards alleged that when he objected that his religious beliefs as a Jehovah’s Witness prohibited his vaccination, his supervisor responded that he would lose his job if he refused the vaccine.¹⁵⁶ However, because Edwards did not allege that he was compelled to submit to the mandatory vaccination or that he suffered any adverse employment action as a result of his refusal to do so, his religious discrimination claim failed as a matter of law.¹⁵⁷

The second case, *Chenzira v. Cincinnati Children's Hospital Medical Center*, was ultimately settled after a federal district court in Ohio refused to dismiss a vegan hospital

¹⁵³ Sydney Lupkin, *Eight Hospital Employees Fired For Refusing Flu Vaccines*, ABC NEWS (Jan. 3, 2012), <http://abcnews.go.com/Health/indiana-hospital-fires-nurses-refusing-flu-shot/story?id=18116967#.UOsDF6zpw-M>.

¹⁵⁴ *Hospitals Crack Down on Staff Refusing Flu Shots*, CBS NEWS (Jan. 12, 2013), <http://www.cbsnews.com/news/hospitals-crack-down-on-staff-refusing-flu-shots/> [hereinafter *Hospitals Crack Down*].

¹⁵⁵ *Edwards v. Elmhurst Hosp. Ctr.*, No. 11-CV-4693, 2013 WL 839535 (E.D.N.Y. Feb. 15, 2013) *report and recommendation adopted*, 11-CV-4693, 2013 WL 828667 (E.D.N.Y. Mar. 6, 2013).

¹⁵⁶ *Id.*

¹⁵⁷ Threats of termination do not, by themselves, constitute an adverse employment action. *Id.*

employee's religious discrimination complaint stemming from her discharge for refusing an influenza vaccination.¹⁵⁸ The court found it plausible that Chenzira, a former customer service representative at Cincinnati Children's Hospital Medical Center, could subscribe to veganism with a sincerity equating to that of traditional religious views.¹⁵⁹ While the court ruled that it was inappropriate to dismiss Chenzira's claim for religious discrimination based on her adherence to veganism, it noted that its "ruling in no way addresses what it anticipates as Defendant's justification for its termination of Plaintiff, the safety of patients at Children's Hospital. At this juncture there simply is no evidence before the Court regarding what, if any, contact Plaintiff might have with patients, and/or what sort of risk her refusal to receive a vaccination could pose in the context of her employment."¹⁶⁰ The case was settled on October 4, 2013.¹⁶¹

The Equal Employment Opportunity Commission (EEOC) has issued guidance and responded to a number of letters from the public regarding how to apply Title VII religious accommodation law to healthcare workers' religious objections to mandatory influenza vaccination. However, despite taking up this issue in October 2009,¹⁶² March 2012,¹⁶³ November 2012,¹⁶⁴ December 2012,¹⁶⁵ and July 2013,¹⁶⁶ the EEOC has largely avoided

¹⁵⁸ Chenzira v. Cincinnati Children's Hosp. Med. Ctr., 1:11-CV-00917, 2012 WL 6721098 (S.D. Ohio Dec. 27, 2012).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Chenzira v. Cincinnati Children's Hosp., 1:11CV00917.

¹⁶² *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Oct. 9, 2009), http://www.eeoc.gov/facts/pandemic_flu.html.

¹⁶³ *Title VII: Religious Accommodation*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Mar. 5, 2012), http://www.eeoc.gov/eeoc/foia/letters/2012/religious_accommodation.html.

¹⁶⁴ *Title VII: Vaccination Policies, Covered Entities, Religious Accommodation*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Nov. 2, 2012), http://www.eeoc.gov/eeoc/foia/letters/2012/religious_accommodation_and_vaccination.html.

¹⁶⁵ *Title VII: Vaccination Policies and Reasonable Accommodation*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Dec. 5, 2012), http://www.eeoc.gov/eeoc/foia/letters/2012/title_vii_vaccination_policies_and_reasonable_accommodation.html.

addressing how to determine whether accommodating such religious objections would impose an undue hardship on an employer. The EEOC's March 2012 letter provides the most insights about undue hardship, stating that "facts relevant to undue hardship in this context would presumably include, among other things, the assessment of the public risk posed at a particular time, the availability of effective alternative means of infection control, and potentially the number of employees who actually request accommodation."¹⁶⁷ This letter also notes that requiring an employee to wear a mask would be an additional infection control measure an employer may require an exempt employee to take.

This guidance from the EEOC highlights the key questions. Does exempting a healthcare worker from a mandatory influenza vaccination policy due to a religious objection impose an undue hardship on an employer? If so, is a face mask requirement an effective, alternative means of infection control, making it a reasonable accommodation that spares an employer undue hardship?

F. Ethical Obligations of Healthcare Workers

Although the two legal questions articulated above are critical to determining if and how healthcare facilities must accommodate employees with religious objections to influenza vaccination, the legal inquiry is only part of what should govern such situations. Individuals who have chosen to enter healthcare professions have committed themselves to caring for patients and have sworn to abide by professional codes of ethics. Physicians take the Hippocratic Oath, which contains the following affirmations: "I will apply, for the benefit of the sick, all measures [that]

¹⁶⁶ *Title VII: Vaccination Policies, Religious Accommodation*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (July 24, 2013), http://www.eeoc.gov/eeoc/foia/letters/2013/title_vii_vaccination_policies_religious_accommodation_7_24.html.

¹⁶⁷ *Title VII: Religious Accommodation*, *supra* note 163.

are required” and “I will prevent disease whenever I can, for prevention is preferable to cure.”¹⁶⁸

The American Medical Association Code of Ethics adds: “A physician must recognize responsibility to patients first and foremost;” “A physician shall recognize a responsibility to participate in activities contributing to the improvement of the community and the betterment of public health;” and “To preserve the quality of their performance, physicians have a responsibility to maintain their health and wellness...When health or wellness is compromised, so may the safety and effectiveness of the medical care provided.”¹⁶⁹ The American Nurses Association Code of Ethics adopts similar professional obligations: “The nurse’s primary commitment is to the patient, whether an individual, family, group or community;” “The nurse promotes, advocates for, and strives to protect the health, safety, and rights of the patient.”¹⁷⁰ Healthcare workers have an ethical obligation to conduct themselves according to these principles.

III. Weighing Public Health Concerns Against Religious Objections

When weighing public health concerns against individuals’ religious objections to influenza vaccination, legal and ethical frameworks both point in the same direction: healthcare workers must consent to vaccination in order to continue working in healthcare facilities. Mandatory influenza vaccination policies for healthcare personnel should not be required to provide religious exemptions.

A. Title VII Application: Undue Hardship

Title VII’s application to a healthcare worker’s religious objection to influenza vaccination hinges on whether accommodating such an employee would impose an undue

¹⁶⁸ Peter Tyson, *The Hippocratic Oath Today*, PBS (Mar. 27, 2001), <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html#modern>.

¹⁶⁹ Alexandra Stewart, INFLUENZA VACCINATION OF THE HEALTH CARE WORKFORCE (July 28, 2011).

¹⁷⁰ *Id.*

hardship on his employer. Two different accommodations are potential options: religious exemption from the mandatory influenza vaccination policy or religious exemption paired with a face mask requirement.

Although § 701(j) affirmatively requires an employer to accommodate an employee's religious needs, accommodation is not required if the employer can demonstrate that "he is unable to reasonably accommodate...an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of [his] business."¹⁷¹ In *Hardison*, the Supreme Court defined "undue hardship" under § 701(j) as requiring an employer to bear anything "more than a de minimis cost."¹⁷² Allowing Hardison to work a four day week and having substitutes on Saturdays was found to impose an undue hardship on TWA because lost efficiency and approximately \$150 in premium wages were both found to constitute more than a de minimis cost.¹⁷³ These hardships seem trivial when compared to the hardship of increasing the likelihood of transmitting influenza to a vulnerable patient who is highly susceptible to risks of severe complications from the illness, including death.¹⁷⁴ It is hard to imagine a more serious hardship than an increased risk of sickening and killing patients, and such a risk certainly seems to constitute more than a de minimis cost. While *Hardison's* standard for undue hardship encompasses monetary and nonmonetary costs, this analysis will focus solely on the increased risk to patient health and safety. Nosocomial influenza outbreaks create a financial burden on healthcare systems, but their substantial contribution to patient morbidity and mortality is sufficiently compelling on its own.¹⁷⁵

¹⁷¹ 42 U.S.C. §2000e(j), *supra* note 112.

¹⁷² "To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." *Hardison*, 432 U.S. at 84.

¹⁷³ *Id.* at 84.

¹⁷⁴ *People at High Risk*, *supra* note 2.

¹⁷⁵ *Starke*, *supra* note 21 at 809.

In *Ansonia*, the Supreme Court announced that, “where the employer has already reasonably accommodated the employee’s religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee’s alternative accommodations would result in undue hardship.”¹⁷⁶ This rule makes it clear that, if a healthcare employer has already established a religious exemption to its mandatory influenza vaccination policy that requires those who are exempted to wear a face mask as a reasonable, alternative means of infection control, the employer need not show that a religious exemption without a face mask requirement would result in undue hardship. If wearing a face mask is a reasonable accommodation to a religious objection to vaccination, an employee cannot claim that he or she is entitled to a religious exemption without a face mask requirement, even though it is a more desirable accommodation.¹⁷⁷ Courts are highly unlikely to hold that a face mask requirement is not a reasonable accommodation, so healthcare facilities with mandatory influenza vaccination policies that require those who are exempted to wear a face mask will most likely not and should not be at risk of liability under Title VII.

If a healthcare facility has a mandatory influenza vaccination policy with no religious exemption, we must determine whether a face mask requirement is an effective, alternative means of infection control or whether such an accommodation would impose an undue hardship. Safety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship; Title VII does not require that safety be subordinated to the religious beliefs of an employee.¹⁷⁸ Furthermore, even though employers’ arguments about safety risks must be grounded in fact and not speculation, an employer need not prove that an accommodation would actually cause injury; showing that the risk of injury is increased is

¹⁷⁶ *Ansonia*, 479 U.S. at 68.

¹⁷⁷ *Id.* at 68-69.

¹⁷⁸ *Draper*, 527 F.2d at 520-21.

sufficient.¹⁷⁹ As discussed above, there are few hardships more significant than that of increasing the likelihood of transmitting influenza to a vulnerable patient who is highly susceptible to risks of severe complications. What is less clear is whether wearing a face mask instead of being vaccinated does in fact increase the risk of transmitting influenza.

In assessing the relative effectiveness of influenza vaccination and face mask use, we must rely on the best data currently available, even if it is not perfect. The best data about influenza vaccine effectiveness indicates that, among healthy adults like healthcare personnel, influenza vaccines antigenically well matched to circulating strains are 70 to 90 percent effective at reducing the transmission of influenza.¹⁸⁰ In contrast, there is little data available about the effectiveness of face masks in natural settings.¹⁸¹ The studies that arguably provide the best data available about face mask use and the transmission of influenza in healthcare settings came to the conclusion that face masks provided no significant protective effect.¹⁸² Overall, there is little evidence supporting the effectiveness of face masks at reducing the transmission of influenza.¹⁸³ Even if this is characterized as simply a gap in the scientific literature, instead of as an indication that face masks are *not* effective, face masks could not be said to be equally as effective at reducing the transmission of influenza as vaccination. As the scientific literature stands right now, there is a higher risk of influenza transmission with face mask use than with vaccination. The conclusion that influenza vaccination is superior to face mask use is consistent with the general consensus of the medical community, since immunization is widely recognized by experts as the most effective way to prevent influenza outbreaks.¹⁸⁴

¹⁷⁹ Finnie, 907 F. Supp. 2d at 778 (*citing* Bhatia, 734 F.2d at 1384).

¹⁸⁰ Starke, *supra* note 21 at 810.

¹⁸¹ Booth et al., *supra* note 46 at 23; Cowling et al., *supra* note 49 at 455.

¹⁸² Cowling et al., *supra* note 45 at 450-51.

¹⁸³ *Id.* at 455.

¹⁸⁴ Starke, *supra* note 21 at 810.

Based on this conclusion, choosing to refuse influenza vaccination and wearing a face mask instead increases the risk of influenza transmission relative to being vaccinated. Just as, in *Bhatia*, the increased risk of causing injury from exposure to toxic gas was sufficient to constitute an undue hardship (and Chevron was not required to prove that this risk would be realized), the increased risk of an unvaccinated healthcare worker infecting vulnerable patients with influenza is sufficient to constitute an undue hardship.¹⁸⁵

The facts relevant to undue hardship in this context could also include how much contact the employee has with patients,¹⁸⁶ “the assessment of the public risk posed at a particular time,” and “the number of employees who actually request accommodation.”¹⁸⁷ However, these facts would affect the magnitude of the undue hardship (how large a “cost” is imposed on the employer) and not the existence of the undue hardship, since even a de minimis cost imposes an undue hardship.

Because accommodating a healthcare worker’s religious objection to vaccination by exempting him or her from an influenza vaccination requirement and instead requiring him or her to wear a face mask imposes an undue hardship on the employer, healthcare facilities with no religious exemptions to their mandatory influenza vaccination policies will most likely not and should not be at risk of liability under Title VII.

B. Professional Obligations

When individuals are choosing what profession to enter, they have an obligation to consider how their religious views might conflict with their potential professional and ethical obligations. If their religious views would prevent them from fulfilling the ethical obligations of the profession, particularly when that profession involves caring for the health and lives of others,

¹⁸⁵ Finnie, 907 F. Supp. 2d at 778.

¹⁸⁶ Chenzira, 1:11-CV-00917, 2012 WL 6721098.

¹⁸⁷ *Title VII: Religious Accommodation*, *supra* note 163.

it may be irresponsible, or worse, to nevertheless choose to enter that profession. Healthcare professions have codes of ethics that require a commitment to caring for patients, sometimes at the expense of one's own beliefs, views, or desires. Healthcare workers who have religious objections to influenza vaccination often argue that they, too, are patients¹⁸⁸ and that they should not lose their rights to refuse medical care and to bodily integrity simply because they work in healthcare facilities.¹⁸⁹ However, as demonstrated above, these rights are not inalienable.¹⁹⁰ In addition, healthcare workers are not "patients" as the word is used in their professional codes of ethics, which clearly intend "patients" to refer to those vulnerable individuals whom healthcare professionals actively care for during the course of their work. If an individual's religious views prevent him or her from receiving an influenza vaccination, there is no way to sincerely swear to "recognize responsibility to patients first and foremost"¹⁹¹ or to conduct oneself as if one's "primary commitment is to the patient."¹⁹² An individual who cannot sincerely swear to live up to the standards required by a profession's code of ethics should not enter that profession.

CONCLUSION

Given the increasing prevalence of mandatory influenza vaccination policies for healthcare workers and the high number of individuals who profess to have religious objections to vaccination, courts will likely have to address how Title VII religious accommodation law applies to cases involving healthcare workers' refusal of an influenza vaccination. Healthcare facilities

¹⁸⁸ "Where does it say that I am no longer a patient if I'm a nurse,' wondered Carrie Calhoun, a longtime critical care nurse in suburban Chicago who was fired last month after she refused a flu shot." *Hospitals Crack Down*, *supra* note 154.

¹⁸⁹ "This is my body. I have a right to refuse the flu vaccine,' Hoover, 61, told ABCNews.com. 'For 21 years, I have religiously not taken the flu vaccine, and now you're telling me that I believe in it.'" Lupkin, *supra* note 153.

¹⁹⁰ "It's not your inalienable right to not get a vaccine if you're helping care for vulnerable patients,' says Paul Offit, chief of infectious diseases at the Children's Hospital of Philadelphia. Offit says two children who were patients at Children's Hospital several years ago couldn't get the flu shot because they were receiving cancer treatment. "They died from getting the flu at the hospital.'" Janice Lloyd, *Mandatory Flu Shots Opposed by Some Health Care Workers*, USA TODAY (Jan. 16, 2013), <http://www.usatoday.com/story/news/nation/2013/01/16/mandatory-flu-shot-nurses/1832813/>.

¹⁹¹ Stewart, *supra* note 169.

¹⁹² *Id.*

with mandatory influenza vaccination policies that require those who are exempted to wear a face mask will most likely not and should not be at risk of liability under Title VII. In addition, because accommodating a healthcare worker's religious objection to vaccination by exempting him or her from an influenza vaccination requirement and instead requiring him or her to wear a face mask imposes an undue hardship, more than a de minimis burden, on the employer, healthcare facilities with no religious exemptions to their mandatory influenza vaccination policies will most likely not and should not be at risk of liability under Title VII. Finally, if an individual's religious views prevent him or her from receiving an influenza vaccination, he or she may not be able to sincerely swear to live up to the standards required by healthcare professions' codes of ethics and should therefore strongly consider not entering a healthcare profession. If hospitals and other healthcare facilities are permitted to enforce strict mandatory influenza vaccination policies, the number of nosocomial influenza outbreaks will likely decrease and patient morbidity and mortality resulting from healthcare workers' vaccine refusals will decline.