



# Mandatory Vaccinations: Precedent and Current Laws

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February 24, 2011

**Congressional Research Service**

7-5700

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

RS21414

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**CRS Report for Congress**  
*Prepared for Members and Committees of Congress*

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## 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, 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*<sup>8</sup> is the seminal case regarding a state’s or municipality’s authority to institute a mandatory vaccination program as an exercise of its police powers. 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 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>

<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> World Health Organization, *Smallpox Fact Sheet*, at <http://www.who.int/mediacentre/factsheets/smallpox/en/>.

<sup>3</sup> Orenstein, Walter A., *The Role of Measles Elimination in Development of a National Immunization Program*, *Pediatr Infect Dis Jn* (2006) 25(12): 1093-1101, available at <http://www.medscape.com/viewarticle/551272>.

<sup>4</sup> See *The People v. Robertson*, 134 N.E. 815, 817 (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 Kathleen S. Swendiman and Jennifer K. Elsea.

<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).

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

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

<sup>9</sup> *Id.* at 31. The Massachusetts statute in question reads as follows: “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 (2010).

<sup>10</sup> *Id.* at 25.

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

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 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

<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. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court held generally that the right to practice religion does not include the liberty to jeopardize the well being of minors.

<sup>14</sup> *Id.* at 28. Smallpox vaccinations are no longer administered since smallpox has been eradicated worldwide as of 1980. See World Health Organization, *Smallpox Fact Sheet*, at

<http://www.who.int/mediacentre/factsheets/smallpox/en/>. One author has suggested that while Mr. Jacobson might be successful in his refusal to be vaccinated against smallpox today since 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 Frank Gottron.

<sup>15</sup> James G. Hodge, Jr. and Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L. J. 831, 868-73 (2001/2002).

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

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

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

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> In addition, various state laws also require vaccination against hepatitis B and meningococcal disease for incoming college and university students.<sup>20</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>21</sup> Generally, for a medical exemption, parents or guardians must provide documentation from a physician.<sup>22</sup> Nearly all states grant exemptions for persons who oppose immunizations for religious reasons.<sup>23</sup> Exemptions based on philosophical or moral convictions in opposition to immunization are less common but are provided by 20 states.<sup>24</sup> States may specify that religious or philosophical beliefs be “sincere” or “conscientiously held.”<sup>25</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>26</sup>

Compulsory vaccination laws as a prerequisite for school enrollment have been the subject of numerous court cases.<sup>27</sup> By and large, the Supreme Court, and most lower courts, have upheld

<sup>19</sup> See the CDC vaccination guidelines at <http://www.cdc.gov/vaccines/recs/default.htm>. A number of states have considered mandating the new Human Papillomavirus vaccine as part of school vaccine requirements. See a summary of state activity at <http://www.ncsl.org/programs/health/HPVvaccine.htm>. See also Rebecca E. Skov, *Examining Mandatory HPV Vaccination for All School-Aged Children*, 62 Food Drug L.J. 805 (2007).

<sup>20</sup> See the Immunization Action Coalition website state charts at <http://www.immunize.org/laws/hepbcollege.asp> and <http://www.immunize.org/laws/menin.asp>.

<sup>21</sup> National Conference of State Legislatures, *States with Religious and Philosophical Exemptions from School Immunization Requirements*, July, 2010, at <http://www.ncsl.org/Default.aspx?TabId=14376>.

<sup>22</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) (2010).

<sup>23</sup> Only 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 (Sup. Ct. Miss. 1979). See Linda E. LeFever, *Religious Exemptions from School Immunization: A Sincere Belief or a Legal Loophole?*, 110 Penn St. L. Rev. 1047 (2006).

<sup>24</sup> The 20 states that allow 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), New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Vermont, Washington, and Wisconsin. National Conference of State Legislatures, *States with Religious and Philosophical Exemptions from School Immunization Requirements*, July, 2010, at <http://www.ncsl.org/Default.aspx?TabId=14376>.

<sup>25</sup> See *e.g.*, MASS. G.L.A. c. 76, § 15 (2010); MINN. STAT. ANN. § 121A.15 (2010).

<sup>26</sup> See *e.g.*, LA. REV. STAT. ANN. § 17:170E (2011); KAN. STAT. ANN. § 72-5209(b)(2) (2009). In *Galinsky v. Board of Education of New York*, 312 F.3d 636 (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’ well being, and not by religious beliefs.

<sup>27</sup> Steve P. Calandrillo, *Vanishing Vaccinations: Why are So Many Americans Opting Out of Vaccinating Their* (continued...)

such laws, granting considerable deference to the use of the states' police power to require immunizations to protect the public health.<sup>28</sup> Still, some courts have held that a state's right to require vaccinations is not absolute, resulting in liberal interpretations of waiver exemptions.<sup>29</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>30</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>31</sup>

During the recent 2009 influenza A(H1N1) pandemic, despite an extensive public education campaign, less than half of health care workers were vaccinated against pandemic influenza.<sup>32</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>33</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>34</sup> However, on October 22, 2009, Governor David A. Paterson announced the suspension of the flu shot mandate for health care

(...continued)

*Children?*, 37 Mich. J.L. Reform 353, 385-388 (2004).

<sup>28</sup> *Id.* at 387-388. See, e.g., cases cited at footnote 13; also, *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>29</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 parent's religious objection to immunizations).

<sup>30</sup> Lindley, Megan C. et al., *Assessing State Immunization Requirements for Healthcare Workers and Patients*, *Am J Prev Med* (2007) 2(6): 459-465.

<sup>31</sup> The CDC maintains a continuously updated online database of state laws pertaining to vaccination requirements at <http://www2a.cdc.gov/nip/StateVaccApp/statevaccsApp/default.asp>.

<sup>32</sup> Harris, K.M. et al. *Influenza Vaccine – Safe, Effective, and Mistrusted*. *N Engl J Med* (2010) 363: 2183-2185, available at <http://www.nejm.org/doi/pdf/10.1056/NEJMp1012333>.

<sup>33</sup> N.Y. Comp. Codes R. & Regs. tit. 10, § 66-3.2 See also a press release issued by New York State Health Commissioner Richard F. Daines on September 24, 2009 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>34</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>.

employees due to the current shortage of both the seasonal flu vaccine and the influenza A(H1N1) vaccine.<sup>35</sup>

In the private sector, employers can 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>36</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>37</sup> Virginia Mason Hospital in Seattle, WA, became the first hospital in the nation, in 2004, 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>38</sup> Staff who refuse the vaccine are required to wear surgical masks when in the hospital.<sup>39</sup> Other hospitals in the private sector have instituted similar mandatory flu vaccination policies,<sup>40</sup> and some policies have been the subject of lawsuits.<sup>41</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

<sup>35</sup> See press release at [http://www.ny.gov/governor/press/press\\_1022094.html](http://www.ny.gov/governor/press/press_1022094.html). In September, 2010, Sen. Tom Duane of the New York state legislature suggested the issue be reconsidered. See <http://vaccinenewsdaily.com/news/215731-ny-pushing-for-mandatory-health-care-worker-flu-vaccinations>. Some groups, such as the American Academy of Pediatrics, have recommended mandatory influenza vaccination of health care workers. See <http://www.msnbc.msn.com/id/39066862/>.

<sup>36</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 at <http://www.osha.gov/Publications/seasonal-flu-factsheet.pdf>.

<sup>37</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.” Fryhofer, S. A. *Immunization 2011: Expanding Coverage, Enhancing Protection* Ann Intern Med (2011) 154(3): 204-206.

<sup>38</sup> Manning, Anita, *Hospitals Shoot for Employees to Get Flu Vaccine*, September 16, 2007, at [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. [http://cdc.confex.com/recording/cdc/nic2008/ppt/free/4db77adf5df9fff0d3caf5cafe28f496/paper15824\\_5.ppt](http://cdc.confex.com/recording/cdc/nic2008/ppt/free/4db77adf5df9fff0d3caf5cafe28f496/paper15824_5.ppt).

<sup>39</sup> The Washington State Nurses Association filed suit in 2007 alleging that implementing the mandatory flu vaccination policy without first negotiating with the nurses’ union violated the Labor Management Relations Act. The 9<sup>th</sup> Circuit Court of Appeals upheld the arbitrator’s decision prohibiting Virginia Mason Hospital from unilaterally implementing the vaccination policy without bargaining with the nurses’ union. The court’s decision is available at <http://healthcareemploymentcounsel.com/examining-room/WashingtonStateNursesAssociationVersusVirginiaMasonHospital.pdf>.

<sup>40</sup> See, e.g., Babcock, H.M. *et al. Mandatory Vaccination of Healthcare Workers: Translating Policy to Practice*, Clin Infect Dis (2010) 50 (4): 459-464, available at <http://cid.oxfordjournals.org/content/50/4/459.full>, and “Mandatory Flu Vaccination Policies Spreading,” at <http://www.massnurses.org/health-and-safety/articles/infectious-diseases/p/openItem/3207>.

<sup>41</sup> See class action lawsuit filed September 2010 by a health care worker against AnMed Health, a network of hospitals and health care facilities in South Carolina, challenging its Influenza Immunization Protocol that provides “unless an approved exemption is made,” the flu vaccination will be “a condition of initial and continued employment of all AnMed employees...” The lawsuit alleges that the mandatory flu vaccination requirements constitute an unreasonable invasion of privacy under South Carolina’s state constitution. The complaint is available at <http://healthcareemploymentcounsel.com/examining-room/HunterVersusAnmedHealth.pdf>.



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>42</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>43</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>44</sup> In addition, exemptions may be provided for medical reasons or where objections are based on religion or conscience.<sup>45</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>46</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>47</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>48</sup> It is important to note that this is intended

<sup>42</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*, section on Role of the Federal Government, for a discussion of the authority of the military to require immunizations of its personnel.

<sup>43</sup> HAW. REV. STAT. § 128-8 (2010). 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 (2011).

<sup>44</sup> FLA. STAT. § 381.00315 (2010).

<sup>45</sup> See, e.g., CONN. GEN. STAT. § 19a-222 (2010) (exemption for physician’s determination of sickness); VA. CODE ANN. § 32.1-48 (2010) (vaccination waived if detrimental to person’s health, as certified by a physician); WIS. STAT. § 252.041 (2010) (vaccination may be refused for reasons of religion or conscience). See, *generally*, Parmet, W.E. *Pandemic Vaccines – The Legal Landscape* N Engl J Med (2010) 362;21: 1949-1952.

<sup>46</sup> See article, “State Takes Extra Steps to Battle Flu in the Fall,” at [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/). <http://www.allbusiness.com/health-care/health-care-professionals-physicians-surgeons/12646804-1.html>

<sup>47</sup> The text of the Center’s Model State Emergency Health Powers Act from 2001 is available at <http://www.publichealthlaw.net/ModelLaws/MSEHPA.php>.

<sup>48</sup> *Id.*

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>49</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>50</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>51</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>52</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>53</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>54</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>55</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.

With regard to foreign countries, the Secretary has the power to restrict the entry of groups of aliens for public health reasons.<sup>56</sup> This power includes the authority to issue vaccination

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<sup>49</sup> The Center for Law and the Public’s Health tracks state legislative activity relating to the Model Act at <http://www.publichealthlaw.net/Resources/Modellaws.htm#MSEHPA>.

<sup>50</sup> Model State Emergency Health Powers Act, Article VI, Sec. 603.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* See Section 604 of the Model Act for provisions relating to quarantine.

<sup>53</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>54</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>55</sup> See 42 C.F.R. Parts 70 (interstate matters) and 71 (foreign arrivals).

<sup>56</sup> See 8 U.S.C. § 1182.

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>57</sup> CDC has determined that two vaccines recommended for routine use by the ACIP—those for human papillomavirus (HPV) and zoster (shingles)—do not have the potential to cause outbreaks, and are therefore not required for admission.<sup>58</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>59</sup>

The military has broad authority in dealing with its personnel, both military and civilian, including the protection of their health.<sup>60</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>61</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>62</sup> two U.S. Marines refused to be vaccinated against smallpox, typhoid, paratyphoid, and influenza because of their religious beliefs.<sup>63</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>64</sup>

<sup>57</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 about health-related grounds for exclusion of immigrants see CRS Report R40570, *Immigration Policies and Issues on Health-Related Grounds for Exclusion*, by Ruth Ellen Wasem.

<sup>58</sup> See CDC, “Criteria for Vaccination Requirements for U.S. Immigration Purposes,” 74 *Federal Register* 58634–58638, November 13, 2009.

<sup>59</sup> 8 U.S.C. § 1182(g)(2).

<sup>60</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’Brien*, 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 *Rostkerv. Goldberg*, 453 U.S. 47 (1981).

<sup>61</sup> 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>62</sup> 36 C.M.R. 741 (1965).

<sup>63</sup> *Id.* at 748.

<sup>64</sup> *Id.* Current military regulations, *supra*, footnote 61, at Chapter 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, DoD’s Anthrax Vaccine Immunization Program website questions and answers at <http://www.vaccines.mil/default.aspx?cnt=resource/qaAll&dID=21&cID=350>.

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>65</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>65</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* (September, 2006) at 19.