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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

MONTANA MEDICAL
ASSOCIATION, FIVE VALLEYS
UROLOGY, PLLC, PROVIDENCE
HEALTH & SERVICES – MT,
WESTERN MONTANA CLINIC, PC,
PAT APPLEBY, MARK
CARPENTER, LOIS FITZPATRICK,
JOEL PEDEN, DIANA JO PAGE,
WALLACE L. PAGE, and
CHEYENNE SMITH,

Plaintiffs,

and

MONTANA NURSES
ASSOCIATION,

Plaintiff-Intervenor,

v.

AUSTIN KNUDSEN, Montana
Attorney General, and LAURIE ESAU,
Montana Commissioner of Labor and
Industry,

Defendants.

Cause No. 9:21-cv-108

Hon. Donald W. Molloy

**PLAINTIFF-INTERVENOR'S
AMENDED COMPLAINT**

Plaintiff-Intervenor the Montana Nurses Association (“MNA”) for its Complaint against the Defendants, Austin Knudsen (in his capacity as Montana Attorney General) and Laurie Esau (in her capacity as Montana Commissioner of Labor and Industry), hereby file their Amended Complaint. This Complaint has been amended solely to reflect the Court’s January 25, 2022, Order and to add Paragraphs 73-88, related to the CMS regulations detailed herein, and Paragraphs C, D, and E of the prayer for relief. Pursuant to Federal Rule of Civil Procedure 15, Defendants have provided written consent for Plaintiff-Intervenor to file this Amended Complaint. Provided, however, that Defendants consent for purposes of Rule 15 only and reserve all substantive arguments and objections to the claims contained in the Amended Complaint.

Plaintiff-Intervenor states as follows:

Jurisdiction

1. Jurisdiction is founded on 28 U.S.C. § 1331 (federal question), on 28 U.S.C. § 1367 (supplemental jurisdiction), and on 42 U.S.C. § 1983 (federal civil rights).
2. This case is also founded on 28 U.S.C. § 2201, which authorizes the Court to grant declaratory relief.

Summary

3. Above all else, Montana nurses are committed to patient care—whether the patient is an individual, a family, a group, a community, or the population.

4. Vaccination requirements for employment as a professional nurse are not new to nurses in Montana. In practice, vaccination requirements work in conjunction with the provision of reasonable accommodations to nurses who cannot be vaccinated, either due to medical contraindications or sincerely held religious beliefs. This relationship has worked in Montana, and has allowed Montana nurses to provide high quality patient care in a safe work environment.

5. Montana House Bill 702 (“HB702”), codified at Mont. Code Ann. § 49-2-312, disrupts that relationship. It prevents healthcare settings from relying on professional judgment and evidence based public health practices to manage the relationship between vaccination requirements and the provision of reasonable accommodations. In so doing, HB702 denies Montana nurses the health and safety protections secured by federal law and the Montana Constitution.

6. MNA brings this challenge to ensure that nurses across Montana may (1) work in a safe environment and (2) provide the highest quality healthcare to patients. MNA seeks relief under similar legal theories as the complaint filed by the Montana Medical Association, et al. (collectively, “MMA”). But where MMA’s complaint is focused on hospitals and the offices of private physicians,

MNA seeks relief from HB702’s workplace restrictions in all healthcare settings where Montana nurses work. Montana nurses care for their patients and face workplace risks from HB702 in a host of different healthcare settings, including “state and local public health agencies and their public and private sector partners,” Mont. Code Ann. § 50-1-101(12), federally qualified health centers, federal health facilities, state and local institutional settings like jails and correctional facilities, school settings, and elsewhere. This Complaint seeks relief that would protect Montana nurses and the patients they serve in each of these healthcare settings— everywhere that HB702 interferes with the mitigation of workplace risks.

7. HB702, § 1(b) and portions of § 1(a) and (c) are invalid to the extent they prevent healthcare settings in Montana from determining the conditions of employment based upon a person’s vaccination or immunity status, or prevent healthcare settings from otherwise appropriately addressing an unvaccinated worker, or prospective worker, in a manner that relies on evidence based public health practices. The statutory provisions are invalid because –

(a) under the Supremacy Clause of the United States Constitution, they are preempted by the following federal laws: (i) the Americans with Disabilities Act (“ADA”) reasonable accommodation provisions, 42 U.S.C. § 12112, (ii) the ADA public accommodation provisions, 42 U.S.C. § 12182, and (iii) the

Occupational Safety and Health Act (“OSHA”), 29 U.S.C. § 654, and its regulations;

(b) they violate the following sections of the Montana Constitution: (i) the inalienable right to “a clean and healthful environment” under article II, section 3 of the Montana Constitution, and (ii) the Equal Protection Clause under article II, section 4 of the Montana Constitution, and

(c) they violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Statute Under Review

8. HB702, as most relevant to this case, states as follows:

Discrimination based on vaccination status or possession of immunity passport prohibited -- definitions. (1) Except as provided in subsection (2), it is an unlawful discriminatory practice for:

(a) a person or a governmental entity to refuse, withhold from, or deny to a person any local or state services, goods, facilities, advantages, privileges, licensing, educational opportunities, health care access, or employment opportunities based on the person’s vaccination status or whether the person has an immunity passport;

(b) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment based on the person's vaccination status or whether the person has an immunity passport; or

(c) a public accommodation to exclude, limit, segregate, refuse to serve, or otherwise discriminate against a person based on the person's vaccination status or whether the person has an immunity passport.

Mont. Code Ann. § 49-2-312(1)(a)–(c).

9. HB702's restrictions are not limited to vaccinations/immunity related to the COVID-19 virus. The bill applies to vaccination against (and immunity status pertaining to) all diseases, known and unknown, that may now or in the future afflict Montanans.

10. HB702 § 1 applies to healthcare settings in Montana.

11. But HB702 § 2, codified at Mont. Code Ann. § 49-2-313, exempts licensed nursing homes, long-term care facilities, and assisted living facilities from the requirements of § 1.

Plaintiff-Intervenor

12. The Montana Nurses' Association (MNA) is a nonprofit professional nurse association that promotes professional nursing practice, standards and education; represents professional nurses; and provides nursing leadership in promoting high quality healthcare. MNA represents approximately 18,000 Registered Nurses (RNs) in Montana, including more than 1000 licensed as Advanced Practice Registered Nurses (APRNs). In addition to its representation of nurses through collective bargaining, MNA is the recognized professional

organization for nurses in Montana. It advocates to protect the practice of professional nursing and to protect the public in all areas of healthcare. MNA has an established focus on workplace environment issues for nurses in Montana, especially issues related to workplace safety. MNA also has an established focus on improving access to quality healthcare by developing and/or supporting public health policies that identify the nurse's primary commitment as to the patient, whether the patient is an individual, a family, a group, the community, or the population.

13. On September 27, 2021, MNA adopted a Position Statement Regarding Vaccinations, attached hereto as Appendix A, that provides:

Historically, the Montana Nurses Association (MNA) has strongly supported immunizations to protect the public from highly communicable and deadly diseases such as measles, mumps, diphtheria, pertussis, and influenza, moreover, has supported appropriate evidence based vaccination policies for registered nurses and health care workers. Under certain circumstances, MNA understands the need for mandatory vaccines as a job requirement (with exemptions noted below), especially due to the several recent and significant measles outbreaks in the United States, as well as the global pandemic of COVID-19.

...

Effective protection of the public health necessitates that all individuals who are able to do so receive immunizations against vaccine-preventable diseases according to the best and most current evidence outlined by the Centers for Disease Control and Prevention (CDC) and the Advisory Committee on Immunization Practices (ACIP). Accordingly, all health care personnel (HCP), including

registered nurses (RNs) and advance practice registered nurses (APRNs), should be vaccinated according to current recommendations for immunization of HCP by the CDC and Association for Professionals in Infection Control and Epidemiology (APIC).

Consistent with state and federal law, MNA strongly supports exemptions from immunization for medical contraindications or sincerely held religious beliefs . . . MNA understands that some RNs and APRNs may not be able to obtain vaccinations as a result of the above noted contraindications/exemptions and the MNA supports employers making accommodations in these circumstances.

14. MNA members are injured by HB702 and would have standing to sue as individuals for the relief sought in this lawsuit. The desired relief is consistent with the MNA mission and germane to its purpose as an organization. Neither the claims, nor the requested relief, requires the participation of individual MNA members. MNA has associational standing to bring this lawsuit.

15. MNA members are employed and provide direct nursing care to patients in healthcare settings across Montana, including “health care facility[ies],” as defined in Mont. Code Ann. § 50-5-101(26)(a),¹ hospitals, offices of private

¹ “‘Health care facility’ or ‘facility’ means all or a portion of an institution, building, or agency, private or public, excluding federal facilities, whether organized for profit or not, that is used, operated, or designed to provide health services, medical treatment, or nursing, rehabilitative, or preventive care to any individual. The term includes chemical dependency facilities, critical access hospitals, eating disorder centers, end-stage renal dialysis facilities, home health agencies, home infusion therapy agencies, hospices, hospitals, infirmaries, long-term care facilities, intermediate care facilities for the developmentally disabled, medical assistance facilities, mental health centers, outpatient centers for primary

physicians, “state and local public health agencies and their public and private sector partners,” Mont. Code Ann. § 50-1-101(12), federally qualified health centers, federal health facilities, state and local institutional settings like jails and correctional facilities, school settings, and others (collectively, “healthcare settings”). APRNs, who have enjoyed full practice authority for over 40 years in Montana, also provide primary and specialty healthcare as independent practitioners in the healthcare settings defined above. In many instances, APRNs own or manage their own private practice to provide primary and/or specialty care.

16. MNA has members with compromised immune systems.

17. Certain MNA members with compromised immune systems are “qualified individuals with a disability” for purposes of the ADA, 42 U.S.C. §§ 12102, 12131, 12181.

18. MNA members treat patients with compromised immune systems.

19. MNA members are employed alongside individuals who may have compromised immune systems.

20. HB702 § 1 prevents, or at least substantially limits, MNA members from working in a safe environment, for themselves and their patients, and inhibits

care, outpatient centers for surgical services, rehabilitation facilities, residential care facilities, and residential treatment facilities.”

MNA members' ability to practice ethical and effective nursing care for at least the following reasons:

- a. Unvaccinated healthcare workers are more likely to spread infectious diseases and pathogens, including, but not limited to, the COVID-19 virus, Hepatitis A, Hepatitis B, Pertussis, Measles, and Influenza, than vaccinated healthcare workers;
- b. Unvaccinated healthcare workers are more likely to spread pathogens through airborne, blood-borne, surface contamination, and other transmission mechanisms than are healthcare workers who are vaccinated against these pathogens;
- c. MNA members have a professional obligation to comply with national standards for the care and treatment of patients, including observing and enforcing infectious disease prevention protocols;
- d. MNA members have a professional obligation to ensure that that all patients, especially immunocompromised patients, be treated in a safe and individualized manner, which includes assurances that treating providers and staff are vaccinated against certain diseases;
- e. The presence of unvaccinated healthcare workers undermines the credibility of MNA members as MNA recognizes the immense power of vaccines in the history and protection of public health and

encourages all nurses, healthcare workers, and community members to consider vaccination as an important step nurses can take to protect themselves, coworkers, and the patients nurses work so hard to care for;

- f. From time to time, MNA members refer their patients to other healthcare settings. Care for these patients may be jeopardized if the receiving institution has unvaccinated employees and/or is otherwise restrained in its ability to safely treat these patients; and
- g. MNA recognizes that nurses have a professional responsibility and an ethical duty to protect patients at all levels.

Defendants

21. Austin Knudsen is the Montana Attorney General and generally charged with the enforcement of the laws of the State of Montana, as they affect the public interest. He is sued in his official capacity.

22. Laurie Esau is the Montana Commissioner of Labor and Industry and is charged with the enforcement of HB702 § 1 through the Montana Human Rights Commission. She is sued in her official capacity.

First Claim – Violation of the Americans with Disabilities Act to Make Reasonable Accommodations

23. The allegations of the preceding Paragraphs are incorporated in this claim as though set forth fully herein.

24. 42 U.S.C. § 12112(b)(5)(A) requires employers to make “reasonable accommodations to the known physical . . . limitations of an otherwise qualified individual with a disability who is an applicant or employee.”

25. If applicants or employees at healthcare settings in Montana have compromised immune systems, the employer, under this provision, must reasonably accommodate those applicants’ or employees’ limitations. This would include taking reasonable precautions to avoid exposing the applicants or employees to an infectious disease from a co-employee.

26. HB702 § 1 prevents employers in healthcare settings from taking the steps necessary to accommodate immune system compromised applicants or employees.

27. HB702 § 1 also requires certain employers in healthcare settings to provide reasonable accommodations to those who are not vaccinated or immune, when there may be no reasonable accommodation to protect against certain infectious diseases.

28. Employers in healthcare settings that adhere to HB702 § 1 risk violating the ADA § 12112(b)(5)(A). As a direct result, MNA members who

require an accommodation under the ADA will not receive the protections of federal disability law if an employer adheres to state law.

29. Furthermore, HB702 § 1 discourages all MNA members, especially immune-compromised members, from accepting potential employment opportunities otherwise available to them at healthcare settings.

30. Because HB702 § 1 prevents employers in healthcare settings from complying with 42 U.S.C. § 12112(b)(5)(A), thus denying these protections to MNA members if employers follow state law, and because it makes it more difficult for MNA members (including and especially those who require an accommodation because of an immunocompromise) to obtain employment in healthcare settings, HB702 § 1 undercuts the purposes of the ADA § 12112(b)(5)(A) and is preempted.

**Second Claim – Violation of the Public Accommodation Provision of
The Americans with Disabilities Act**

31. The allegations of the preceding Paragraphs are incorporated in this claim as though set forth fully herein.

32. Under the ADA, a disability is a “physical or mental impairment that substantially limits one or more major life activities of such individual.” 42 U.S.C. § 12102(1)(A) (2021).

33. Certain healthcare settings in Montana are public accommodations under the ADA. 42 U.S.C. § 12181(7)(F) (2021).

34. The ADA, under 42 U.S.C. § 12182(b)(2)(A)(iii) prohibits the following form of discrimination:

[A] failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.

35. HB702 § 1 prevents healthcare settings from taking those steps necessary to ensure that MNA members with compromised immune systems are able to utilize the services of those offices and facilities to the same extent as can patients without compromised immune systems, and thus denies these benefits to MNA members with compromised immune systems.

36. HB702 § 1 thus limits the access of MNA members with compromised immune systems, to healthcare settings in which they are employed or in which they receive their own care.

37. Because HB702 § 1 prevents healthcare settings from complying with 42 U.S.C. § 12182, because it denies MNA members the benefits of the protection of federal law, and because it reduces the accessibility of healthcare settings to

persons with compromised immune systems, including MNA members, it is preempted by the ADA.

Third Claim – Violation of the Occupational Safety and Health Act

38. The allegations of the preceding Paragraphs are incorporated in this claim as though set forth fully herein.

39. OSHA, at 29 U.S.C. § 654(a)(1), states: “Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

40. The COVID-19 virus, Hepatitis B, Pertussis, and other communicable diseases are recognized hazards that are causing, or are likely to cause, death or serious physical harm.

41. Because HB702 § 1 impedes employers in healthcare settings from identifying or controlling the placement of employees based upon vaccination status, employers in healthcare settings are unable to comply – or are at least impeded from complying – with OSHA § 654(a)(1).

42. As a direct result, MNA members employed in healthcare settings are denied the benefits of federal law.

43. Further, HB702 § 1 limits the ability of those persons with compromised immune systems who now work at healthcare settings, or who may

wish to work in healthcare settings, from securing the benefits of OSHA § 654(a)(1).

44. Because HB702 § 1 undercuts the purposes of OSHA § 654(a)(1), it is preempted.

Fourth Claim – Violation of OSHA Regulation

45. The allegations of the preceding Paragraphs are incorporated in this claim as though set forth fully herein.

46. OSHA, at 29 U.S.C. § 654(a)(2) states: “Each employer . . . shall comply with occupational safety and health standards promulgated under [OSHA].”

47. OSHA Regulation § 1910.502, (codified at 29 C.F.R. § 1910.502) in turn, requires, that, where employees provide healthcare services or healthcare support services – (c)(1) “The employer must develop and implement a COVID-19 plan,” which is to include (c)(7) “policies and procedures to [m]inimize the risk of transmission of COVID-19 for each employee.”

48. Employers in healthcare settings cannot develop meaningful plans to minimize the risk of employees’ COVID-19 transmission if they are barred from taking steps to mitigate the risks caused by unvaccinated employees. As a result, HB702 denies the intended beneficiaries of the regulation—including MNA members—from its benefits and protections.

49. Because HB702 § 1 prevents—or at least impedes—healthcare settings, from complying with OSHA § 654(a)(2) and OSHA Regulation § 1910.502, and other similar regulations, HB702 § 1 is preempted.

**Fifth Claim – Violation of Montanans’ Constitutional Right
To a Safe and Healthy Environment**

50. The allegations of the preceding Paragraphs are incorporated in this claim as though set forth fully herein.

51. The Montana Constitution, in its Declaration of Rights, provides: “All persons are born free and have certain inalienable rights. They include the right to a . . . healthful environment and the rights of . . . seeking their safety [and] health . . . in all lawful ways.” Mont. Const. art. II, § 3.

52. HB702 § 1 prevents MNA members from enjoying their constitutional right to a healthful environment, both in their workplace and when they receive their own care.

53. HB702 § 1 prevents persons with compromised immune systems, including MNA members, from enjoying a healthy environment and securing their right to safe and healthy healthcare.

54. HB702 § 1 therefore violates § 3 of the Montana Constitution’s Declaration of Rights.

**Sixth Claim – Violation of Montana’s Constitutional Obligation
To Provide Equal Protection of the Laws**

55. The allegations of the preceding Paragraphs are incorporated in this claim as though set forth fully herein.

56. The Montana Constitution requires that “[n]o person shall be denied the equal protection of the laws.” Mont. Const. art. II, § 4.

57. Under HB702 § 2, MNA members in certain healthcare settings, are treated more stringently than those employed nursing homes, long term care facilities, or assisted living facilities.

58. HB702 thereby draws an unreasonable and baseless distinction between all other healthcare setting and certain facilities that treat the same types of patients. HB702 specifically draws an unreasonable and baseless distinction between nursing homes, long term care facilities, or assisted living facilities, and all other healthcare settings.

59. Immunocompromised and other disabled Montana citizens, including MNA members, are disparately and adversely affected by HB702 as compared with other similarly situated Montana citizens. For example, immunocompromised MNA members who work or receive care in licensed nursing home facilities are entitled to work alongside and/or receive treatment only from vaccinated providers, whereas immunocompromised MNA members who work or receive care in other clinical settings are not.

60. There is no state interest or rational basis for treating nursing homes, long term care facilities, or assisted living facilities differently than all other healthcare settings in Montana.

61. There is no state interest or rational basis for discriminating against immunocompromised or otherwise disabled Montana citizens, including MNA members, in this adverse manner.

62. Consequently, HB702 § 1 violates Montana's constitutional obligation to provide equal protection of the laws to immune system compromised Montanans, including MNA members, who may seek or require treatment in healthcare settings not provided in HB702's exceptions for nursing homes, long term care facilities, or assisted living facilities.

**Seventh Claim – Violation of
Equal Protection Clause of the Fourteenth Amendment**

63. The allegations of the preceding Paragraphs are incorporated in this claim as though set forth fully herein.

64. The Fourteenth Amendment to the United States Constitution provides that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

65. All other healthcare settings in Montana are treated more stringently than nursing homes, long term care facilities, or assisted living facilities.

66. HB702 thereby draws an unreasonable and baseless distinction between nursing homes, long term care facilities, or assisted living facilities, and all other healthcare settings.

67. Immunocompromised and other disabled Montana citizens, including MNA members, are disparately and adversely affected by HB702 as compared with other similarly situated Montana citizens. For example, immunocompromised MNA members who work or receive care in licensed nursing home facilities are entitled to work alongside and/or receive treatment only from vaccinated providers, whereas immunocompromised patients who receive care in other healthcare settings are not.

68. There is no state interest or rational basis for treating nursing homes, long term care facilities, or assisted living facilities differently than all other healthcare settings in Montana.

69. There is no state interest or rational basis for discriminating against immunocompromised or otherwise disabled Montana citizens, including MNA members, in this adverse manner.

70. Consequently, HB702 § 1(b) violates the Equal Protection Clause of the Fourteenth Amendment in that it discriminates against including MNA members, who may seek or require treatment in healthcare settings not provided in

HB702's exceptions for nursing homes, long term care facilities, or assisted living facilities.

71. 42 U.S.C. § 1983 provides: "Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

72. Deprivation of equal protection of the laws under the Fourteenth Amendment is a deprivation of a constitutional right, and thus the Defendants in this action can be sued in this Court for redress.

Additional Allegations

73. The allegations of the preceding Paragraphs are incorporated in this claim as though set forth fully herein.

74. In order for certain healthcare providers to care for patients covered under the federal Medicare or Medicaid programs, they must satisfy the conditions of participation set forth in 42 C.F.R. Part 482 (collectively referred to hereafter as the "CMS Regulations"), promulgated by the Centers for Medicare & Medicaid Services ("CMS").

75. Compliance with the CMS Regulations is required in order to receive Medicare and Medicaid funding.

76. Failure to comply with the CMS Regulations may lead to monetary penalties, denial of payment for new admissions or other services, and/or termination of participation in Medicare and Medicaid. Healthcare settings in Montana rely on participation in Medicare and Medicaid in order to obtain the revenue necessary to employ MNA members.

77. MNA members are subject to these requirements to the extent they are employed by healthcare settings in Montana that care for patients covered under the federal Medicare and Medicaid programs and must therefore comply with the Conditions of Participation set forth in the CMS Regulations. Other healthcare settings employing MNA members have the same requirement to comply with the CMS Regulations as nursing homes, long term care facilities, and assisted living facilities. *Compare* 42 C.F.R. § 482.42(g) (providing requirement for Hospitals) *with* 42 C.F.R. § 483.80(i) (providing requirement for Long Term Care Facilities including Skilled Nursing Facilities and Nursing Facilities).

78. MNA members are among the intended beneficiaries of these provisions; to the extent the provisions are frustrated by the application of state law, the conflict injures MNA members because they cannot receive the protections to which they are entitled.

79. Loss of Medicare and Medicaid funding and/or the inability to care

for Medicare and Medicaid patients also injures MNA members by threatening their employment.

Eighth Claim – Violation of CMS Regulation

80. The allegations of the preceding Paragraphs are incorporated in this claim as though set forth fully herein.

81. The Social Security Act at 42 U.S.C. § 1395(x)(e)(9), § 1395i-4(e), and § 1395k(a)(2)(F)(i), authorized the Secretary of Health and Human Services to establish conditions of participation in the Medicare and Medicaid programs.

82. The CMS Conditions of Participation include, but are not limited to, the following regulations:

- a. 42 C.F.R. § 482.41, which states that “[t]he hospital must be ... maintained to ensure the safety of the patient.”
- b. 42C.F.R. § 482.42, which states that “[t]he hospital must have active hospital-wide programs for the surveillance, prevention, and control of HAIs [healthcare-associated infections] and other infectious diseases. ... The programs must demonstrate adherence to nationally recognized infection and control guidelines ... as well as to best practices for ... infection prevention.”
- c. 42 C.F.R. §482.42(g), which states—“Standard: COVID-19 Vaccination of hospital staff. The hospital must develop and

implement policies and procedures to ensure that all staff are fully vaccinated for COVID-19.”

d. 42 C.F.R. §482.42(g)(3), which states, in part—“The policies and procedures must include, at a minimum, the following components:

(i) A process for ensuring all staff [with certain exceptions] have received, at a minimum, a single-dose COVID-19 vaccine, or the first dose of the primary vaccination series for a multi-dose COVID-19 vaccine prior to staff providing any care, treatment, or other services for the hospital and/or its patients;

(ii) A process for ensuring that all staff [with exceptions] are fully vaccinated for COVID-19;

(iii) A process for ensuring the implementation of additional precautions, intended to mitigate the transmission and spread of COVID-19, for all staff who are not fully vaccinated for COVID-19;

(iv) A process for tracking and securely documenting the COVID-19 vaccination status of ... staff.”

83. The CMS Regulations require healthcare settings to impose different treatment for members of their staff based upon vaccination status and/or the presence of an immunity passport

84. Healthcare settings that employ MNA members cannot comply with both § 49-2-312, MCA, and the CMS Regulations. At a minimum, § 49-2-312, MCA, impedes compliance with the CMS Regulations and undercuts its purposes.

85. If healthcare settings in Montana employing MNA members fail to comply with the CMS conditions of participation on account of § 49-2-312, MCA, MNA members seeking healthcare themselves, will have their ability to seek safe healthcare jeopardized. This would undercut the purpose behind 42 C.F.R. Part 482, including the purpose behind 42 C.F.R. §§ 482.41, 481.42, 481.42(g), and 481.42(g)(3).

86. The Federal Register notice adopting the COVID-19 vaccination requirement for Medicare and Medicaid participating hospitals states: “We intend, consistent with the Supremacy Clause of the United States Constitution, that this nationwide regulation preempts inconsistent State and local laws as applied to Medicare- and Medicaid-certified providers and suppliers.” 86 Fed. Reg. 61555, 61568 (Nov. 5, 2021).

87. The Federal Register notice further states: “we find that State and local laws that forbid employers in the State or locality from imposing vaccine requirements on employees directly conflict with this exercise of our statutory health and safety authority to require vaccinations for staff of the providers and suppliers subject to this rule.” *Id.*, at 61613 (emphasis in original).

88. Accordingly, to the extent that MCA 49-2-312 prohibits Montana healthcare settings that employ MNA members from complying with the CMS Conditions of Participation, including requiring vaccination of their staff under 42

C.F.R. Part 482, or undercuts the purpose of the CMS Regulations, § 49-2-312, MCA, is preempted.

Relief Requested

Consequently, the Plaintiff-Intervenor prays for the following relief:

- A. A declaration that HB702 § 1 is invalid and unenforceable within healthcare settings to the following extent:
 - (i) The phrase “employment opportunities” in HB702 § 1(a) is invalid and unenforceable,
 - (ii) The terms “facilities, advantages, privileges” and other terms in § 1(a) are invalid and unenforceable to the extent they are construed to apply in the employment context in healthcare settings,
 - (iii) Section 1(b) is invalid and unenforceable in its entirety, and
 - (iv) The terms “exclude,” “limit,” “segregate,” and the phrase “or otherwise discriminate” in HB702 § 1(c) are invalid and unenforceable in the employment context in healthcare settings;
- B. A permanent injunction prohibiting the Defendants from enforcing HB702 § (1) in healthcare settings to the following extent:
 - (i) A permanent injunction against enforcing the phrase “employment opportunities” in HB702 § 1(a),

- (ii) A permanent injunction against enforcing the terms “facilities, advantages, privileges” and other terms in §1(a) to the extent they are construed to apply in the employment context in healthcare settings,
 - (iii) A permanent injunction against enforcing HB702 § 1(b) in its entirety, and
 - (iv) A permanent injunction against enforcing the terms “exclude,” “limit,” “segregate,” or the phrase “or otherwise discriminate” in HB702 § 1(c) in the employment context in healthcare settings in Montana;
- C. A declaration that § 49-2-312, MCA is invalid and unenforceable against healthcare settings in Montana employing MNA members that are covered by the CMS Regulations.
- D. A permanent injunction prohibiting the Defendants from enforcing § 49-2-312, MCA, against healthcare settings in Montana employing MNA members that are covered by the CMS Regulations.
- E. A preliminary injunction prohibiting the Defendants from enforcing § 49-2-312, MCA, against healthcare settings in Montana employing MNA members that are covered by the CMS regulations.
- E. Attorney’s fees, including litigation expenses, and costs; and

F. Such other relief as may be just and proper.

DATED this 3rd day of February, 2022.

/s/ Raph Graybill

Raph Graybill

Attorney for Plaintiff-Intervenor

APPENDIX A



MNA Position Statement Regarding Vaccinations September 27, 2021

Purpose

Historically, the Montana Nurses Association (MNA) has strongly supported immunizations to protect the public from highly communicable and deadly diseases such as measles, mumps, diphtheria, pertussis, and influenza, moreover, has supported appropriate evidence based vaccination policies for registered nurses and health care workers. Under certain circumstances, MNA understands the need for mandatory vaccines as a job requirement (with exemptions noted below), especially due to the several recent and significant measles outbreaks in the United States, as well as the global pandemic of COVID-19.

Statement of MNA Position

Effective protection of the public health necessitates that all individuals who are able to do so receive immunizations against vaccine-preventable diseases according to the best and most current evidence outlined by the Centers for Disease Control and Prevention (CDC) and the Advisory Committee on Immunization Practices (ACIP). Accordingly, all health care personnel (HCP), including registered nurses (RNs) and advance practice registered nurses (APRNs), should be vaccinated according to current recommendations for immunization of HCP by the CDC and Association for Professionals in Infection Control and Epidemiology (APIC).

Consistent with state and federal law, MNA strongly supports exemptions from immunization for medical contraindications or sincerely held religious beliefs. For example, the United States Equal Opportunity Employment Commission (EEOC) has issued guidance that “once an employer is on notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act.” For additional guidance from the EEOC, including on the relationship between federal disability protections and vaccine requirements in the workplace, visit <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

MNA understands that some RNs and APRNs may not be able to obtain vaccinations as a result of the above noted contraindications/exemptions and the MNA supports employers making accommodations in these circumstances. Under the recently enacted Montana House Bill 702, individuals exempted from vaccination may be required to adopt measures or practices in the workplace to reduce the chance of disease transmission and expect employers to offer reasonable accommodations in such circumstances.

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MNA encourages RNs and APRNs to work together with their employers to ensure that such accommodations are tailored to reduce disease transmission and encourages all nurses and HCP to stay up to date on and follow policies guided by current, evidence-based CDC and ACIP recommendations.

Appropriate personal protective equipment (PPE), along with evidence-based policies and practices, should be made available for all nurses and health care workers, whether they are able to vaccinate or not.

Vaccination requirements for employment as a professional nurse are not new to nurses. MNA strongly recommends that registered nurses be vaccinated against COVID-19, especially now with FDA approval (Pfizer-BioNTech full FDA approval 8/23/2021 for ages 16 and over--Moderna vaccine FDA application for full approval has been submitted and is awaiting approval). This vaccine, along with other FDA approved vaccines, will continue to be encouraged by MNA.

MNA does not believe nurses should be retaliated against by employers if they **cannot** be vaccinated and supports employers accommodating all nurses and HCP who, due to the exemptions noted, cannot be vaccinated.

MNA recognizes that nurses have a professional responsibility and an ethical duty to protect patients at all levels—as individuals, families, groups, communities, and populations. We recognize the immense power of vaccines in the history and protection of public health, and encourage all nurses, HCPs, and community members to consider vaccination as an important step each one of us can take to protect ourselves, each other, and the patients we work so hard to care for. If any individual has concerns regarding getting vaccinated, please reach out to your local public health department and discuss your particular decision with your health care provider.

As novel diseases emerge, such as COVID-19, MNA supports ongoing scientific research and development of safe, easily accessible, and affordable vaccinations for these public health threats.

Vaccinations must be available to everyone!

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