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

MONTANA MEDICAL ASSOCIATION, et al.,

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 BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

"Vaccination requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella." *Biden v. Missouri*, 142 S. Ct. 647, 653 (2022).

Not so in Montana, at least not any longer. Montana Code Annotated § 49-2-312 ("§ 49-2-312") prohibits healthcare settings from requiring *any* vaccination as a condition of employment, including ordinary workplace vaccinations for hepatitis B, influenza, measles, mumps, rubella, and varicella. The statute also prevents healthcare settings from collecting accurate information about the immunity status of their employees. And the statute severely limits healthcare settings from responding to non-vaccinated employees consistent with evidence based public health practices.

The Court should enter permanent injunctive relief against the enforcement of § 49-2-312 in healthcare settings in Montana. No genuine issue of material fact precludes resolution of the legal issues in this case at summary judgment.

First, § 49-2-312 and its companion provision in § 49-2-313 violate state and federal equal protection guarantees because they arbitrarily exempt certain facilities ("Exempted Facilities"). Nurses in Exempted Facilities like nursing homes face the same workplace risks from vaccine-preventable disease as nurses in

other healthcare settings. No legitimate (much less compelling) state interest supports the differential treatment of Exempted Facilities. And the distinction has no relationship to the various state interests Defendants Austin Knudsen and Laurie Esau ("Defendants") offer in defense of the statute.

Second, the Court should hold that federal law preempts § 49-2-312. Section 49-2-312 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Section 49-2-312 prevents employers from providing reasonable accommodations to members of the Montana Nurses Association ("the Nurses") who are vulnerable to vaccine-preventable disease and require accommodations under the Americans with Disabilities Act ("ADA"). Section 49-2-312 also conflicts with the obligations the Occupational Safety and Health Act ("OSH Act") places on healthcare settings to free the workplace from the long-recognized hazard of vaccine-preventable infectious disease. Section 49-2-312 also conflicts with the clear preemption language of the Final Interim Rule and Guidance promulgated by the Centers for Medicare and Medicaid Services ("CMS") requiring COVID-19 vaccination for most healthcare workers as a condition of participation in CMS programs.

Because § 49-2-312 violates equal protection principles and is preempted by federal law, the Court should enter targeted, permanent injunctive relief against its

enforcement in healthcare settings. The Court should limit the scope of the injunction to the employment context.

All the requirements for permanent injunctive relief are met. The Nurses succeed on the merits of their claims as a matter of law. The Nurses' constitutional injuries are irreparable harm, as is the risk of illness and death occasioned by the unsafe working conditions the statute requires. And both the equities and the public interest favor permanent injunctive relief. The public's interests in public health, non-discrimination law, and workplace safety substantially outweigh any private, individual interests advanced by § 49-2-312.

I. RELATIONSHIP TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

To prevent redundancy, Plaintiff-Intervenor the Montana Nurses Association ("Plaintiff-Intervenor" or "the Nurses") joins Plaintiffs the Montana Medical Association, et al., ("Plaintiffs") in the arguments stated in Plaintiffs' Motion for Summary Judgment and Brief in Support of Motion for Summary Judgment.

However, as this Court has noted, the Nurses seek slightly broader relief than Plaintiffs: an injunction against the enforcement of § 49-2-312 in all Montana healthcare settings where nurses are found, not just hospitals and offices of private physicians. Court's Order on Motion to Intervene, ECF No. 26 at 2-3 (Nov. 11, 2021). The Nurses are principally affected by § 49-2-312 in their capacity as

employees. Thus, their employee/workplace interest in § 49-2-312 is distinct from the employer interests and patient interests advanced in Plaintiffs' briefing. Accordingly, this brief focuses on (1) the Nurses' distinct workplace interest and (2) their request that the Court extend injunctive relief to all healthcare settings in which the Nurses' members are found.

The Nurses join the Statement of Undisputed Facts, jointly prepared with Plaintiffs.

II. BACKGROUND

A. Section 49-2-312

The Montana Legislature first transmitted House Bill 702 to the Governor of Montana on April 28, 2022. Declaration of Vicky Byrd ("Byrd Decl."), Exh. A. The bill made "immunity status" a protected classification under the Montana Human Rights Act, equivalent to longstanding prohibitions against discrimination based on race or sex. SUF 84 (House Bill 702 bill text).

The Governor did not approve it. SUF 83. He returned House Bill 702 to the Legislature with a series of proposed amendments and a letter to explain them. *Id.* The Governor wrote, "I firmly believe that . . . any documentation related to an individual's vaccination status [is] an unwarranted infringement on our liberties." *Id.* The Governor's proposed amendments exempted certain long-term care settings from having to comply with the anti-discrimination law if doing so would

violate "regulations or guidance" issued by CMS or the Centers for Disease Control and Prevention ("CDC"). SUF 83,84. The Governor's amendments also allowed certain healthcare facilities to ask an employee his or her vaccination status—the employee would not have to answer—and to provide reasonable accommodations to non-vaccinated employees. *Id.* The accommodation is for the non-vaccinated person, not for the public or other employees who are vulnerable to vaccine-preventable disease. *Id.*

The Legislature debated the Governor's amendments before approving them. SUF 54. The bill's sponsor explained and adopted the Governor's reasoning about the need to comply with CMS conditions of participation. *Id.* The Legislature then approved the Governor's amendments. *Id.*; SUF 84. The Governor signed House Bill 702 into law on May 7, 2021. Byrd Decl., Exh. A. It is now codified at §§ 49-2-312 (the prohibitions) and 49-2-313 (provision for Exempted Facilities).

The Montana Human Rights Bureau ("HRB"), a component agency of the Montana Department of Labor and Industry ("DLI"), has primary statutory responsibility for enforcing provisions of the Montana Human Rights Act and § 49-2-312. SUF 59. But Defendants' representatives described a slapdash enforcement process involving a bevy of different officials, with puzzling results. SUF 81.

Defendant Laurie Esau's representative testified that aggrieved members of

the public, including state legislators, provide the Lieutenant Governor of Montana with unverified reports of organizations or individuals suspected to be in violation of § 49-2-312. SUF 81. The Lieutenant Governor then personally directs the Chief of Staff of the Montana Department of Labor and Industry to send the suspected violator an "education letter." *Id.* The letters threaten criminal penalties if the recipient does not come into compliance. *Id.* The HRB and its investigators have no involvement in this process, unless a formal complaint is eventually filed. SUF 67,81. The Lieutenant Governor and the DLI have sent "education letters" with threats of criminal penalties to, among other entities, the United States Court of Appeals for the Ninth Circuit—even though DLI simultaneously publishes guidance that it has no jurisdiction to enforce § 49-2-312 against federal entities. SUF 81.

The HRB has received a slew of complaints seeking enforcement of § 49-2-312, including complaints against healthcare settings. SUF 66,68. The agency is actively enforcing the law apart from those cases held in abeyance due to the Court's March 2021 Preliminary Injunction Order. *See* ECF No. 53; SUF 81. The agency found against a healthcare setting for requiring its employees to obtain an influenza vaccination. SUF 72. It also found against an organization holding a conference for cancer survivors. SUF 73. Though the cancer survivor conference offered a remote attendance option, the HRB found that the organization violated

§ 49-2-312 by requiring proof of vaccination to attend in person. *Id.*

B. The Montana Nurses Association

The Montana Nurses Association is the professional association that speaks on behalf of the approximately 18,000 Registered Nurses and approximately 1,000 Advanced Practice Registered Nurse ("APRN") in Montana. Byrd Decl., ¶ 2. It is both a professional association and a labor union representing thousands of Montana nurses covered by collective bargaining agreements. *Id.* It has 2,700 dues-paying members. *Id.* Workplace safety and quality patient care are central to the organization's purpose. *Id.*, ¶ 3. The Montana Nurses Association has an established focus on workplace safety issues. *Id.*

The facts regarding vaccine-preventable disease and workplace safety are not in dispute. Communicable disease, including vaccine-preventable disease, is a recognized workplace hazard in healthcare settings. SUF 7. Ordinary workplace vaccinations are safe and effective at reducing the transmission and severity of disease, including vaccinations for hepatitis B, influenza, measles, mumps, rubella, and varicella. *See Biden v. Missouri*, 142 S. Ct. at 653; SUF 1,2. Prior to the enactment of § 49-2-312, members of the Montana Nurses Association were long required to obtain ordinary workplace vaccinations as a condition of their employment in healthcare settings, or to show proof of their existing immunity status. Byrd Decl., ¶ 20. Vaccination requirements for healthcare workers are an

essential component of infection control plans in healthcare settings that keep healthcare workers safe. *Id.*, ¶ 19; SUF 1,2,25. Accurate information about an employee's immunity status is also an essential component of infection control plans in healthcare settings that keep healthcare workers safe. Byrd Decl., ¶ 22; SUF 39,40.

III. LEGAL STANDARD

A. Summary Judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

B. Declaratory and Injunctive Relief

The Court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201. The Court may issue further necessary or proper relief based on a declaratory judgment or decree, including appropriate injunctive relief to protect and enforce its judgment. 28 U.S.C. § 2202;

Rincon Band of Mission Indians v. Harris, 618 F.2d 569, 575 (9th Cir. 1980).

IV. ARGUMENT

A. Section 49-2-312 denies MNA members equal protection of the laws

Section 49-2-312 treats similarly situated classes of nurses unequally. The differential treatment does not serve a legitimate—much less a compelling—state interest. And the policy of differential treatment is completely unmoored from the state interest it purports to advance.

Section 49-2-312 prohibits ordinary vaccination requirements and prevents the collection of accurate information about employees' immunity status. These prohibitions apply both to "healthcare facilities" as defined in 49-2-312(3)(b) and to other healthcare settings in which the Nurses' members are found, such as the offices of private physicians or APRN practices. But § 49-2-312 applies no such restrictions in Exempted Facilities—long-term care facilities, nursing homes, and assisted living facilities—due to the Governor's amendments to House Bill 702 codified at § 49-2-313.

Montana nurses face the same, recognized workplace risk from the spread of vaccine-preventable disease whether they work in Exempted Facilities or somewhere else, like a hospital or an APRN clinic. Thus, the operation of §§ 49-2-312 and 49-2-313 effects unequal treatment on Montana nurses by subjecting some

nurses to riskier and less healthy working conditions than other similarly situated nurses in Exempted Facilities. The Court should declare that the operation of the two statutes creates constitutionally-impermissible disparate treatment, and enjoin the enforcement of § 49-2-312.[1]

1. Section 49-2-312 violates Article II, Section 4 of the Montana Constitution

Sections 49-2-312 and 49-2-312 violate the Montana Constitution's equal protection provision by burdening the fundamental rights of similarly situated Montana nurses who do not work in Exempted Facilities.

Article II, Section 4 of the Montana Constitution provides that "No person shall be denied the equal protection of the laws." The Nurses' members enjoy a fundamental constitutional right to "seek[] their safety, health and happiness in all lawful ways." Mont. Const., art. II, § 3 ("Inalienable rights"). The fundamental right to seek safety, health, and happiness in all lawful ways includes the fundamental right to pursue employment. *Wadsworth v. State*, 275 Mont. 287, 299, 911 P.2d 1165, 1172 (1996) ("we hold that the opportunity to pursue employment . . . is itself a fundamental right because it is a right without which other constitutionally guaranteed rights would have little meaning." (cleaned up)).

[1] Enjoining § 49-2-312 renders § 49-2-313 meaningless. The Court should enjoin § 49-2-312 because it is the section that burdens the Nurses' rights. Enjoining only the Exempted Facilities provision in § 49-2-313 would "level down" by *expanding* the burden created by § 49-2-312 to all nurses.

Under Montana law, "[e]qual protection provides a check on governmental action that treats similarly situated persons in an unlike manner." *Caldwell v. MACo Workers' Comp. Tr.*, 2011 MT 162, ¶ 14, 361 Mont. 140, 143, 256 P.3d 923, 926 (Morris, J.) (holding, on rational basis review, that Montana worker's compensation statute violated right to equal protection in Montana Constitution). Analysis of the Montana Equal Protection Clause includes three steps:

> First, the Court identifies the classes involved and determines if they are similarly situated. Second, the Court determines the appropriate level of scrutiny to apply to the challenged statute. Finally, the Court applies the appropriate level of scrutiny to the statute.

Hensley v. Montana State Fund, 2020 MT 317, ¶ 18, 402 Mont. 277, 477 P.3d 1065 (citing *Satterlee v. Lumbermans Mut. Cas. Co.*, 2009 MT 368, ¶¶ 15-18, 353 Mont. 265, 222 P.3d 566).

Sections 49-2-312 and 49-2-313 create similarly situated classes—nurses in Exempted Facilities and those in non-exempt healthcare settings—but treats them unequally. The Court

> determine[s] if the two classes are similarly situated by isolating the factor subject to the allegedly impermissible discrimination . . . If the two groups are equivalent in all respects other than the isolated factor, then they are similarly situated.

Hensley, ¶ 21 (citations omitted). There is no genuine dispute of material fact that nurses in Exempted Facilities face the same workplace risks from vaccine-preventable disease as those in non-exempt facilities. Byrd Decl., ¶ 17; SUF

50,54. Nurses in all relevant settings treat patients in varying degrees of health. Byrd Decl., ¶ 13. Nurses in all settings interact in close quarters for extended periods of time with coworkers and with patients. *Id*., ¶ 14. There are nurses vulnerable to vaccine-preventable disease in all settings. *Id*., ¶ 15. Communicable disease is a recognized hazard in all settings. *Id.* ¶ 16. In sum, when it comes to workplace risk from vaccine-preventable disease, the classes are similarly situated in all pertinent respects.[2]

Because the classes are similarly situated, the Court then determines the appropriate level of scrutiny. *Hensley*, ¶ 18. On this claim, strict scrutiny applies. Under Montana law, "[s]trict scrutiny applies if a fundamental right is affected." *Stand Up Montana v. Missoula Cnty. Pub. Sch.*, 2022 MT 153, ¶ 10 (citing *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445); *Driscoll v. Stapleton*, 2020 MT 247, ¶ 18, 401 Mont. 405, 473 P.3d 386 ("strict scrutiny [is] used when a statute implicates a fundamental right found in the Montana Constitution's declaration of rights."). "Under the strict scrutiny standard, the state carries the burden of demonstrating the challenged law or policy

[2] Plaintiffs describe how the statute further divides non-exempt facilities into two more categories—"health care facilities" as defined by a Montana statute, and all other facilities such as offices of private physicians. The Nurses agree with Plaintiffs that the "exemption" for healthcare facilities to solicit (but not receive) information about immunity status and provide "reasonable accommodations" to non-vaccinated persons is insufficient to create a work environment as safe as what is permitted in Exempted Facilities.

is narrowly tailored to serve a compelling government interest and only that interest." *Stand Up Montana*, ¶ 10 (citing *Snetsinger*, ¶ 17 and *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997)). The State's burden to demonstrate a compelling interest is demanding: "[n]ecessarily, demonstrating a compelling interest entails something more than simply saying it is so." *Wadsworth*, 275 Mont. at 303, 911 at 1174. Further, "[w]hen the government intrudes upon a fundamental right, any compelling state interest for doing so must be closely tailored to effectuate only that compelling state interest." *Id.* (citation omitted). Finally, "the State, to sustain the validity of such invasion [to a fundamental right], must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective." *Id.* (citation omitted).

The Court has already held that strict scrutiny applies. Court's Order Motion to Dismiss, ECF No. 35 at 15 (Jan. 25, 2022) ("The Individual Plaintiffs and the Nurses' claims are subject to strict scrutiny because a fundamental right is implicated."). The Nurses' members have fundamental rights under the Montana Constitution to seek health and safety in all lawful ways, as well as the fundamental right to seek employment, that are burdened by the differential treatment. Mont. Const., art. II, § 3; *Wadsworth*, 275 Mont. at 299, 911 P.2d at 1172.

The statute fails strict scrutiny. There is no compelling government interest

in allowing ordinary workplace vaccination requirements and the collection of accurate information on employee immunity status in Exempted Facilities, and preventing and penalizing the same conduct in other healthcare settings.

First, setting aside that Defendants have the burden to establish the existence of a compelling state interest, the legislative history of House Bill 702 makes clear what the Legislature and the Governor sought to accomplish. In his amendatory veto letter, the Governor wrote that he believed it was necessary to add the exception for Exempted Facilities to allow those facilities to comply with CMS regulations. SUF 83. The Legislature discussed and adopted the Governor's rationale when approving the amendments and passing the bill. SUF 54,83,84.[3] But the rationale crumbles under its own internal inconsistencies. Hospitals crucially rely on CMS conditions of participation, but they are not included as Exempted Facilities. SUF 88-92. And assisted living facilities, which *are* included in Exempted Facilities, typically do not have to follow CMS conditions of participation. SUF 88. As a result, the state objective is irrational and internally inconsistent. It fails utterly to meet the requirements for a "compelling" state interest under Montana law. *Armstrong v. State*, 1999 MT 261, ¶ 41 n.6, 296 Mont. 361, 989 P.2d 364 ("to demonstrate that its interest justifying infringement

[3] The amendments also mention CDC guidance and regulations, but the Governor's letter and the legislative debate focused on CMS requirements.

of a fundamental constitutional right is 'compelling' the state must show, at a minimum, some interest of the highest order and not otherwise served, or the gravest abuse, endangering a paramount government interest." (cleaned up)). A purported state interest cannot be legitimate—much less compelling—if it is arbitrary or rests on legislative misunderstanding. Not all Exempted Facilities are required to meet CMS conditions of participation—and many non-exempt facilities are wholly reliant on CMS and its conditions of participation, but are not included within the exemption. Thus, the exemption to allow some, not all, facilities to meet CMS conditions of participation is irrational and advances no state interest at all.

Even if the Court were to find, *arguendo*, the existence of a state objective, the same problems discussed above sever the state objective from the distinction it draws. A state objective to allow compliance with CMS conditions of participation has no relationship to the distinction as it operates in §§ 49-2-312 and 49-2-313: hospitals are not exempted (who rely on CMS), but assisted living facilities are (for whom the exemption does nothing in the context of complying with CMS conditions of participation). The distinction drawn has no relationship to its purported interest, whatsoever.

The provision for Exempted Facilities also mentions compliance with CDC "guidance." To the extent the state interest is something broader than meeting

express CMS requirements—like advancing the ability to comply with CMS and CDC guidance and regulations generally—the state interest still has no relationship (close, rational, or anything in between) to the distinction it draws. That's because CDC guidance, for example, applies equally to Exempted Facilities and non-exempt healthcare settings in Montana. Nurses who work in nursing homes, hospitals, and the offices of a private physician are all subject to CDC guidance regarding the immunization of healthcare workers. Byrd Decl., ¶ 18. They are identically situated, but the statute arbitrarily allows one group of Montana nurses the benefits of CDC guidance, and threatens criminal penalties for applying the same guidance in virtually identical workplace settings.

In sum, the distinction is wholly unrelated to the state interest. For this reason, it is simply not possible to "show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective." *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174. Rather, the "classification . . . is patently arbitrary and bears no rational relationship to a legitimate governmental interest." *Jaksha v. Butte-Silver Bow Cty.*, 2009 MT 263, ¶ 24, 352 Mont. 46, 214 P.3d 1248. It "offends equal protection of the laws" of Montana. *Id.*

Defendants may offer alternative state objectives for the distinction, less tethered to the actual legislative history or the words of the exception itself. But they cannot save the statute on strict scrutiny, either.

Defendant Austin Knudsen's designee testified that the state interest is contained in the statute itself. SUF 85. The only other portion of the statute from which to identify a state interest is its preamble, which provides that,

> health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy and health care or other interests.

SUF 84. The preamble also quotes a Montana Supreme Court decision concluding that "medical records . . . are quintessentially private and deserve the utmost constitutional protection." *Id.* (quoting *State v. Nelson*, 283 Mont. 231, 941 P.2d 441 (1997)). To the extent that securing the privacy of medical records is the state objective in play, it has *no* relationship to the distinction drawn between nurses in Exempted Facilities and those who work in other healthcare settings. Medical privacy concerns are unrelated to a policy that criminalizes ordinary workplace vaccination requirements in private physician offices, while allowing them in long-term care facilities.

The statute likewise fails to the extent Defendants argue that "vaccine freedom," more broadly, is the interest advanced by the distinction. "Vaccine freedom" is not a compelling government interest. *See Williams v. Brown*, 567 F. Supp. 3d 1213, 1226 (D. Or. 2021) (collecting cases following *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905), that demonstrate the "growing consensus . . . that there is no fundamental right under the Constitution to refuse vaccination").

But even if, *arguendo*, "vaccine freedom" met the demanding test for a "compelling" interest, *Armstrong*, 989 P.2d at 375 n.6, Defendants still cannot carry their burden to demonstrate a close relationship between that interest and the arbitrary line between nurses in Exempted Facilities and nurses found elsewhere. If the state interest is as broad as "vaccine freedom," why create an exemption at all, especially if the exemption undermines the state interest by allowing for common vaccination requirements? The statute and its classifications fail on this purported interest, too.

At bottom, the rationale for the distinction articulated by its author—the Governor—and adopted by the Legislature is not a "compelling" state interest that survives strict scrutiny, or even rational basis scrutiny. Even if it did, the distinction drawn by the statute has no relationship to the state objective. The same problem—no narrow tailoring, no close relationship, no relationship at all—beguiles other possible state interests Defendants may claim the statute advances. For these reasons, the statute fails strict scrutiny. The Court should hold that §§ 49-2-312 and 49-2-313 violate the Montana Constitution's equal protection guarantee as it applies to the employment context in healthcare settings in Montana, and should enter an injunction against the enforcement of § 49-2-312.

Finally, it is worth nothing that rational basis review is no "free pass" under Montana Supreme Court precedent, either. *See Satterlee*, ¶ 44 (Morris, J.,

dissenting) (describing rational basis test employed in *Jaksha*, 214 P.3d 1248, to invalidate state statute on equal protection grounds under rational basis review as "rational scrutiny with bite"). Though strict scrutiny is the correct standard to apply, *Driscoll*, ¶ 18, the Montana Supreme Court has often invalidated statutes for violating equal protection principles on rational basis review. *See, e.g.*, *Arneson v. State*, 262 Mont. 269, 275, 864 P.2d 1245, 1249 (1993) (invalidating statute on equal protection grounds under rational basis test where "[t]he constitutional defect of the statute as applied to respondent is revealed when it is reviewed in light of its practical application."); *Reesor v. Montana State Fund*, 2004 MT 370, ¶ 19, 325 Mont. 1, 7, 103 P.3d 1019, 1023 (despite legitimate government interest, "the disparate treatment . . . is not rationally related to that legitimate governmental interest."); *Caldwell*, 2011 MT 162 (same). The Montana Supreme Court's analysis in *Jaksha*, ¶ 24, is particularly instructive. There, the Montana Supreme Court held that "[w]ithout any factual or empirical basis for drawing a cut-off point at 34 years of age [to become a firefighter] . . . is wholly arbitrary." *Id.* The Court determined that there was simply no rational relationship between the state interest advanced—there, the promotion of public safety—and arbitrarily limiting entry to the firefighting profession to Montanans over 34. Quoting *Timm v. Dept. of Pub. Health and Human Ser.*, 2008 MT 126, 343 Mont. 11, 184 P.3d 994, the Court held that "'[a] classification that is patently arbitrary and bears no rational

relationship to a legitimate governmental interest offends equal protection of the laws.'" *Id.* The age of 34 had no special significance; practically and empirically, its arbitrary threshold was not rationally related to promoting public safety. The same is true for distinction between nurses in Exempted Facilities and elsewhere—it is arbitrary, with no rational relationship to a legitimate state interest. For the reasons described above, though strict scrutiny is the correct standard of review under Montana law, the statute also fails rational basis review.

2. Section 49-2-312 violates the Fourteenth Amendment

The distinction between nurses in Exempted Facilities and in all other healthcare settings in Montana also violates the right to equal protection of the laws under the Fourteenth Amendment.

Federal courts follow a similar process in assessing equal protection claims: identifying the group affected by a classification and a control group, determining whether they are similarly situated, determining the appropriate level of scrutiny, then applying it. *Gallinger v. Becerra*, 898 F.3d 1012, 1016 (9th Cir. 2018) (citations omitted).

For the same reasons described above, the Exempted Facilities provision creates a class of Montana nurses who are identically situated—in terms of the workplace risk of vaccine-preventable disease—to Montana nurses who work in other, non-exempt healthcare settings.

Although federal courts have yet to review a statute that bars ordinary vaccination requirements and the collection of accurate information about employees' immunity status, most courts have applied rational basis review to state statutes related to vaccinations. *Williams*, 567 F. Supp. 3d at 1226 (collecting cases). A challenged state statute survives rational basis review if "it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). And,

> [a]lthough it is difficult to show that a law violates the equal protection clause under rational basis review, it is not impossible, since some laws are so irrational or absurd on their face it is clear they can be motivated by nothing other than animus or prejudice against a group.

Tucson Woman's Clinic v. Eden, 379 F.3d 531, 543-44 (9th Cir. 2004) (emphasis added) (citation omitted), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

The distinction between nurses in Exempted Facilities and other Montana nurses fails rational basis review because it does not advance a legitimate state interest, and bears no relationship to the interest it purports to serve. The Governor's rationale—adopted by the Legislature—is irrational, internally inconsistent, and unrelated to the distinction drawn. Some Exempted Facilities are not required to comply with CMS conditions of participation; but many non-exempt facilities are. This is no state interest at all. The policy is completely

unrelated to the interest, for the same reason.

The statute fails to survive even the most generous review because the distinction it draws is wholly arbitrary. Accordingly, § 49-2-312 violates the Fourteenth Amendment. The statute effects an arbitrary distinction on nurses that burdens their rights to health and safety in the workplace.

B. Federal law preempts § 49-2-312

The Americans With Disabilities Act, the Occupational Safety and Health Act, and a CMS rule each conflict with, and preempt, § 49-2-312 as the state statute applies to Montana nurses in healthcare settings. *See* Plaintiffs' Brief in Support of Motion for Summary Judgment.

"The doctrine of preemption flows from the Supremacy Clause of the United States Constitution." Court's Order Entering Preliminary Injunction, ECF No. 53 at 13 (Mar. 18, 2022) (citing U.S. Const. art. VI cl. 2). Under conflict preemption,

> state law must give way to federal law "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. (quoting *English*, 496 U.S. at 79).

1. The Americans With Disabilities Act preempts § 49-2-312

As explained by Plaintiffs in their Brief in Support of Motion for Summary Judgment, the ADA preempts § 49-2-312. The Nurses join and incorporate

Plaintiffs' brief in full.

Among the Nurses' members are Montana nurses who are vulnerable to vaccine-preventable disease, including those whose conditions qualify as disabilities under the ADA. Byrd Decl., ¶¶ 8-9. The ADA requires healthcare settings to provide reasonable accommodations to these nurses. 42 U.S.C. § 12112(b)(5)(A). But § 49-2-312 frustrates this requirement by preventing healthcare settings from treating employees differently based on their vaccination status, from requiring any customary workplace vaccinations, and even from collecting accurate information about their employees' immunity status. Absent the ability to treat employees according to their conditions, and absent accurate information about employees' immunity status, healthcare settings cannot comply with their obligations under the ADA to MNA members who require accommodation.

These members, along with the patient Plaintiffs, are the intended beneficiaries of the ADA. But § 49-2-312 frustrates the accomplishment of Congress's objectives by denying healthcare settings the tools and information they require to comply with the ADA. Because they conflict, the ADA preempts § 49-2-312 under the Supremacy Clause and the state policy yields.

2. The Occupational Safety and Health Act preempts § 49-2-312

"The OSH Act requires that every employer provide a workplace that is 'free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees' (the 'general duty' clause)." *Flower World, Inc. v. Sacks*, No. 21-35641, 2022 WL 3270759, at *2 (9th Cir. Aug. 11, 2022) (quoting 29 U.S.C. § 654(a)). The general duty clause applies, and preempts conflicting state policies, when the Occupational Safety and Health Administration ("OSHA") has not promulgated specific safety standards under the Act. *Id.* (quoting *Donovan v. Royal Logging Co.*, 645 F.2d 822, 829 (9th Cir. 1981)). As employees in healthcare settings, the Nurses' members are the intended beneficiaries of the OSH Act and within its zone of interests.

The OSH Act preempts § 49-2-312 because the state statute prevents employers in healthcare settings from complying with the general duty clause and its requirement to render healthcare workplaces free from the recognized hazard of vaccine-preventable disease. To demonstrate that a workplace condition violates the general duty clause, three conditions must be met: "(1) the employer failed to render its workplace 'free' of a hazard which was (2) 'recognized' and (3) 'causing or likely to cause death or serious injury.'" *Donovan*, 645 F.2d at 829 (citation omitted). A healthcare setting that cannot treat employees according to their

condition, collect accurate information about immunity status, or require common vaccinations is unable to render its workplace free from the recognized hazard of vaccine-preventable disease.

Communicable disease, including vaccine-preventable disease, has long been "recognized" as a workplace hazard under the OSH Act. *See, e.g.*, 29 C.F.R. § 1910.1030 (OSHA bloodborne pathogen standard for healthcare workers). The recognized hazard is specific to healthcare settings. Byrd Decl., Exh. B (OSHA "Healthcare – Infectious Diseases" site). There is no dispute that "[h]ealthcare workers (HCWs) are occupationally exposed to a variety of infectious diseases during the performance of their duties." *Id.* And there is no dispute that the diseases common workplace vaccinations protect against—hepatitis B, influenza, measles, mumps, rubella, and varicella, for example—may cause serious injury or even death. SUF 8,12,21.

But healthcare settings in Montana cannot comply with both the general duty clause and § 49-2-312 because the state statute prohibits healthcare settings from utilizing the most important tools to render their workplaces free from the recognized hazard of vaccine-preventable disease: common vaccination requirements, and the ability to treat employees according to their (actual, known) immunity status. SUF 25,34,39,42,47.

Prior to § 49-2-312, healthcare settings in Montana addressed the recognized

hazard of vaccine-preventable disease in the healthcare workplace like every other state in the country has for decades: through routine vaccinations and the collection of accurate information regarding employees' immunity status. *See Biden v. Missouri*, 142 S. Ct. 647, 653 (2022) ("Vaccination requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella."). Routine vaccinations and the collection of accurate information on employees' immunity status are bedrock features of the American healthcare system, so much so that prior to § 49-2-312 it was inconceivable that a state would deny healthcare settings these elementary infection control tools.

Under § 49-2-312, healthcare settings are denied these tools without an adequate replacement. It is not in dispute that masking is no substitute for vaccination requirements. SUF 47,48. And, for some diseases like Hepatitis B—which is bloodborne—masking and distancing have simply no effect on reducing the hazard. SUF 27-30,47,48. In any other state, a healthcare setting could require vaccination for Hepatitis B or change the conditions of employment to protect a vulnerable employee who cannot be vaccinated from the risk of needlestick injury, for example. But neither tool—nor the information about immunity status necessary to utilize the tool according to evidence based public health practices—is

lawful under § 49-2-312.

Because vaccine-preventable disease is a recognized hazard specific to the healthcare workplace, the general duty clause requires employers to mitigate it. Section 49-2-312 stands as a clear obstacle.

At bottom, "[t]he question of whether a certain state action is pre-empted by federal law is one of congressional intent." *Gade v. Nat'l Sold Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992). In enacting the OSH Act, Congress sought "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). Because it blocks the accomplishment and execution of the full purposes and objectives of Congress in the OSH Act, § 49-2-312 is preempted.

3. The CMS Rule and Guidance preempts § 49-2-312

Finally, this Court held in its March 18, 2022 Order that the CMS Rule and Guidance regarding COVID-19 vaccinations for healthcare workers in CMS-participating facilities preempts § 49-2-312. The Rule, the Guidance, and their clear preemption language remain in effect. Accordingly, and for the reasons stated in the Court's March Order, Plaintiffs and Plaintiff-Intervenor succeed on the merits of this claim.

C. The Court should enter a permanent injunction

The Court should issue a permanent injunction enjoining Defendants from

enforcing § 49-2-312 in healthcare settings in Montana, and it should limit the scope of its injunction to the employment context. The Nurses seek somewhat broader relief than Plaintiffs because the Nurses' members are found in healthcare settings beyond the physician offices, critical access hospitals, and hospitals that are the subject of Plaintiffs' request for relief. The justifications for the Nurses' request, however, are identical to those advanced by Plaintiffs—the statute makes their work less safe, wherever they work.

The Nurses join and incorporate by reference Plaintiffs' request for a permanent injunction in their Brief in Support of Summary Judgment. First, the Nurses have demonstrated actual success on the merits of their claims. Second, the Nurses' constitutional injuries are irreparable injuries that support injunctive relief. *Am. Trucking Ass'ns v. City of L.A.*, 559 F.3d 1046, 1058 (9th Cir. 2009). And the risks of illness and death are also irreparable injures, occasioned by the unsafe work environments that Defendants impose on the Nurses through § 49-2-312.

Third, the balance of hardships and the public interest—which merge in this case—support permanent injunctive relief. Injunctive relief preventing Defendants from enforcing § 49-2-312 in healthcare settings in Montana will return matters to the way they were in Montana for decades. Healthcare settings in Montana will enjoy the same tools to ensure quality patient care and safe workplaces as anywhere else in the country. But denying injunctive relief will lead to the

continued enforcement of § 49-2-312 in non-CMS participating healthcare settings in Montana under the troubling enforcement process described above. If the CMS rule is no longer in effect for any reason and the preliminary injunction is lifted, Defendants will expand and continue their enforcement of § 49-2-312 to a far wider range of healthcare settings—under the same enforcement process and to the same puzzling results described above.

Finally, the public's interests in the supremacy of federal law, in the promotion of the public health, in federal non-discrimination law, and in federal workplace safety law substantially outweigh the private, individual interests advanced by § 49-2-312.

V. CONCLUSION

The Court should enter summary judgment in favor of the Nurses on Claims I, II, III, VI, VII, and VIII of the Nurses' Amended Complaint (ECF No. 38) and hold that §§ 49-2-312 and 49-2-313 violate the Montana and United States Constitutions' guarantees to equal protection, and that § 49-2-312 is preempted by federal law: the ADA, the OSH Act, and the CMS Rule and Guidance. The Court should then enter a permanent injunction preventing Defendants from enforcing § 49-2-312 in healthcare settings in Montana. The Court should limit the scope of the injunction to the employment context. An injunction against § 49-2-313 is unnecessary if § 49-2-312 is enjoined.

DATED this 26th day of August, 2022.

/s/ Raph Graybill
Raph Graybill

Attorney for Plaintiff-Intervenor

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this Brief in Support of Motion for Summary Judgment is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word for Microsoft 365, is 6497 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

/s/ Raph Graybill
Raph Graybill

Attorney for Plaintiff-Intervenor

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2022, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

/s/ Raph Graybill
Raph Graybill

Attorney for Plaintiff-Intervenor

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

MONTANA MEDICAL ASSOCIATION, et al., Plaintiffs, and MONTANA NURSES ASSOCIATION, Plaintiff-Intervenors, v. AUSTEN KNUDSEN, et al., Defendants.	Case No. CV 21-00108-DWM DECLARATION OF VICKY BYRD

I, Vicky Byrd, declare, pursuant to 28 U.S.C. § 1746 and under penalty of perjury, that the foregoing is true and correct:

1. I am the Chief Executive Officer of the Montana Nurses Association ("MNA").

2. MNA is the professional voice of approximately 18,000 registered nurses and approximately 1,000 advanced practice registered nurses ("APRN") in Montana. MNA is both a professional association and a labor union. It represents thousands of Montana nurses covered by collective bargaining agreements. MNA has approximately 2,700 dues-paying members.

3. Workplace safety for nurses is at the heart of MNA's mission as an organization. MNA has an established focus on workplace safety, including on safety related to the workplace hazard of vaccine-preventable disease.

4. I have been a registered nurse since 1989. I started my career as a certified pediatric nurse and in 2002 became a certified oncology nurse.

5. I have worked at a healthcare facility in Montana and have personal knowledge of the employment and personnel policies of that facility that applied to me in my work as a nurse.

6. In my position as CEO of MNA, I am very familiar with, and have personal knowledge of, employment and personnel policies at Montana healthcare facilities that employ MNA members.

7. In my experience as a nurse and in my position as CEO of MNA, I have visited personally with thousands of Montana nurses about the conditions of their employment, their work environments, and other aspects of their work as

nurses in Montana, including workplace safety concerns and the risk of vaccine-preventable disease.

8. MNA has members who are vulnerable to vaccine-preventable disease.

9. MNA has members whose vulnerability to vaccine-preventable disease qualifies as a disability under the Americans With Disabilities Act.

10. MNA does not maintain private health records of its members, and most records of disability accommodation requests are kept between individual members and employers.

11. From my experience as a nurse and from my work as CEO of MNA, I am familiar with the work environment for nurses in all manner of healthcare settings in Montana in which MNA members work, including in hospitals, the offices of private physicians, APRN clinics, nursing homes, long-term care facilities, assisted living facilities, and other healthcare settings.

12. From my experience as a nurse and from my work as CEO of MNA, I am familiar with the workplace safety issues in all manner of healthcare settings in Montana in which MNA members work, including in hospitals, the offices of private physicians, APRN clinics, nursing homes, long-term care facilities, assisted living facilities, and other healthcare settings.

13. Based on my experience as a nurse and from my work as CEO of MNA, nurses in hospitals, the offices of private physicians, APRN clinics, nursing homes, long-term care facilities, assisted living facilities, and other healthcare settings treat patients in varying degrees of health.

14. Based on my experience as a nurse and from my work as CEO of MNA, nurses in hospitals, the offices of private physicians, APRN clinics, nursing homes, long-term care facilities, assisted living facilities, and other healthcare settings interact in close quarters for extended periods of time with coworkers and with patients.

15. Based on my experience as a nurse and from my work as CEO of MNA, there are nurses who are vulnerable to vaccine-preventable disease in hospitals, the offices of private physicians, APRN clinics, nursing homes, long-term care facilities, assisted living facilities, and other healthcare settings.

16. Based on my experience as a nurse and from my work as CEO of MNA, vaccine-preventable disease has long been recognized as a workplace hazard in hospitals, the offices of private physicians, APRN clinics, nursing homes, long-term care facilities, assisted living facilities, and other healthcare settings.

17. Based on my experience as a nurse and from my work as CEO of MNA, nurses in hospitals, the offices of private physicians, APRN clinics, nursing

homes, long-term care facilities, assisted living facilities, and other healthcare settings face the same workplace risks from vaccine-preventable disease.

18. Based on my experience as a nurse and from my work as CEO of MNA, nurses in hospitals, the offices of private physicians, APRN clinics, nursing homes, long-term care facilities, assisted living facilities, and other healthcare settings are all the subject of CDC guidance, including CDC guidance on the immunization of health care workers.

19. Based on my experience as a nurse and from my work as CEO of MNA, vaccination requirements for healthcare workers are an essential component of infection control plans in healthcare settings that keep healthcare workers and patients safe

20. Before the Montana Legislature passed House Bill 702 in 2021, vaccination requirements for nurses were common in healthcare settings in Montana.

21. Before the Montana Legislature passed House Bill 702 in 2021, it was common for healthcare settings in Montana to require the provision of accurate information regarding the immunity status of their employees, and to respond to employees according to their actual condition, immunity status, and needs.

22. Based on my experience as a nurse and from my work as CEO of

MNA, accurate information about an employee's immunity and vaccination status is also an essential component of infection control plans in healthcare settings that keep healthcare workers safe.

23. When I worked at St. Peter's Hospital in Helena, MT before the passage of HB702, St. Peter's Hospital required as a condition of my employment that I be vaccinated against certain diseases or show immunity status, and required proof of vaccination.

24. Attached hereto as Exhibit A is a true and correct copy of the "Detailed Bill Information" page for House Bill 702, which I downloaded on August 26, 2022 from the Montana Legislature's website at http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20211&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=702&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=.

25. Attached hereto as Exhibit B is a true and correct copy of website "Healthcare / Infectious Diseases" published by the United States Department of Labor, Occupational Safety and Health Administration ("OSHA"), which I downloaded on August 26, 2022 from OSHA's website at https://www.osha.gov/healthcare/infectious-diseases.

DATED this 26 day of August, 2022.

Vicky Byrd

Vicky Byrd

Exhibit A

MONTANA LEGISLATIVE BRANCH

Montana Legislature

Detailed Bill Information

2021 January Regular Session

The 67th Regular Session of the Montana Legislature adjourned Sine Die on April 29th, 2021; Legislative day 80.

| Top | Actions | Sponsor, etc. | Subjects | Add'l Bill Info | Eff. Dates | New Search |

Bill Draft Number: LC1472 Current Bill Text: Previous Version(s)

Bill Type - Number: HB 702

Associated Amendments Disclaimer: All amendments are drafts only for consideration by a committee and are subject to change. An amendment formally adopted by the committee will be incorporated into the standing committee report to the respective body and, if adopted, will be engrossed into the next version of the bill.

Short Title: Prohibit discrimination based on vaccine status or possessing immunity passport

Primary Sponsor: Jennifer Carlson (R) HD 69

Chapter Number: 418

Bill Actions - **Current Bill Progress:** Became Law

Bill Action Count: 75

Print Friendly

Action - Most Recent First	Date	Votes Yes	Votes No	Committee / Audio
Chapter Number Assigned	05/07/2021			
(H) Signed by Governor	05/07/2021			
(H) Transmitted to Governor	05/04/2021			
(S) Signed by President	05/04/2021			
(H) Signed by Speaker	05/04/2021			
(C) Printed - Enrolled Version Available	04/30/2021			
(H) Returned from Enrolling	04/30/2021			
(H) Sent to Enrolling	04/29/2021			
(S) Returned to House Concurred in Governor's Proposed Amendments	04/29/2021			
(S) 3rd Reading Governor's Proposed Amendments Adopted	04/29/2021	31	19	
(S) 2nd Reading Governor's Proposed Amendments Adopted	04/29/2021	31	19	
(S) Scheduled for 2nd Reading	04/29/2021			
(H) Transmitted to Senate for Consideration of Governor's Proposed Amendments	04/28/2021			
(H) 3rd Reading Governor's Proposed Amendments Adopted	04/28/2021	64	32	
(H) Scheduled for 3rd Reading	04/28/2021			
(H) 2nd Reading Governor's Proposed Amendments Adopted	04/28/2021	65	35	
(H) Scheduled for 2nd Reading	04/28/2021			
(H) Returned with Governor's Proposed Amendments	04/28/2021			
(H) Transmitted to Governor	04/28/2021			
(S) Signed by President	04/28/2021			
(H) Signed by Speaker	04/28/2021			
(C) Printed - Enrolled Version Available	04/27/2021			
(H) Returned from Enrolling	04/27/2021			
(H) Sent to Enrolling	04/26/2021			
(H) 3rd Reading Passed as Amended by Senate	04/26/2021	67	32	
(H) Scheduled for 3rd Reading	04/26/2021			
(H) 2nd Reading Senate Amendments Concurred	04/26/2021	67	33	
(H) Scheduled for 2nd Reading	04/26/2021			
(S) Returned to House with Amendments	04/23/2021			
(S) 3rd Reading Concurred	04/23/2021	32	18	
(S) Scheduled for 3rd Reading	04/23/2021			
(C) Printed - New Version Available	04/22/2021			

(S) 2nd Reading Concurred as Amended	04/22/2021	31	19	
(S) 2nd Reading Motion to Amend Carried	04/22/2021	29	21	
(S) 2nd Reading Motion to Amend Carried	04/22/2021	30	20	
(S) 2nd Reading Motion to Amend Failed	04/22/2021	25	25	
(S) Scheduled for 2nd Reading	04/22/2021			
(C) Printed - New Version Available	04/20/2021			
(S) Committee Report--Bill Concurred as Amended	04/20/2021			(S) Public Health, Welfare and Safety
(S) Committee Executive Action--Bill Concurred as Amended	04/20/2021	6	3	(S) Public Health, Welfare and Safety
(S) Hearing	04/12/2021			(S) Public Health, Welfare and Safety
(S) Referred to Committee	04/09/2021			(S) Public Health, Welfare and Safety
(S) First Reading	04/06/2021			
(H) Transmitted to Senate	04/06/2021			
(H) 3rd Reading Passed	04/06/2021	62	33	
(H) Scheduled for 3rd Reading	04/06/2021			
(C) Printed - New Version Available	04/01/2021			
(H) 2nd Reading Passed as Amended	04/01/2021	66	34	
(H) 2nd Reading Motion to Amend Carried	04/01/2021	99	1	
(H) Scheduled for 2nd Reading	04/01/2021			
(C) Amendments Available	04/01/2021			
(H) Committee Report--Bill Passed	03/31/2021			(H) Judiciary
(H) Sponsor List Modified	03/31/2021			
(H) Committee Executive Action--Bill Passed	03/31/2021	12	7	(H) Judiciary
(H) Hearing	03/31/2021			(H) Judiciary
(C) Introduced Bill Text Available Electronically	03/29/2021			
(H) First Reading	03/29/2021			
(H) Referred to Committee	03/29/2021			(H) Judiciary
(H) Introduced	03/29/2021			
(C) Draft Delivered to Requester	03/29/2021			
(C) Draft Ready for Delivery	03/26/2021			
(C) Executive Director Final Review	03/26/2021			
(C) Draft Ready for Delivery	03/26/2021			
(C) Draft in Assembly	03/26/2021			
(C) Executive Director Review	03/26/2021			
(C) Bill Draft Text Available Electronically	03/26/2021			
(C) Draft in Final Drafter Review	03/26/2021			
(C) Draft in Input/Proofing	03/26/2021			
(C) Draft to Drafter - Edit Review	03/23/2021			
(C) Draft in Edit	03/23/2021			
(C) Draft in Legal Review	03/23/2021			
(C) Draft to Requester for Review	03/17/2021			
(C) Draft Taken Off Hold	03/05/2021			
(C) Draft On Hold	02/11/2021			
(C) Draft Request Received	12/01/2020			

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Sponsor, etc.

Sponsor, etc.	Last Name/Organization	First Name	Mi
Requester	Hinkle	Jedediah	
Drafter	Sandru	Alexis	
Primary Sponsor	Carlson	Jennifer	

| Top | Actions | Sponsor, etc. | Subjects | Add'l Bill Info | Eff. Dates | New Search |

Subjects

Description	Revenue/Approp.	Vote Majority Req.	Subject Code
Appropriations (see also: State Finance)	Appropriation	Simple	APP
Health (see also: Health Care Services; Safety)		Simple	HLTH
Local Government (see also: City Subjects; County Subjects)		Simple	LG
Safety (see also: Health)		Simple	SAF
State Government		Simple	STGO

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Additional Bill Information

Fiscal Note Probable: No
Preintroduction Required: N
Session Law Ch. Number: 418
DEADLINE
Category: Appropriation Bills
Transmittal Date: 04/08/2021
Return (with 2nd house amendments) Date: 04/29/2021

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Section Effective Dates

Section(s)	Effective Date	Date Qualified
Sections 1,2, and 4-6	07-MAY-21	
Section 3	01-JUL-21	

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Exhibit B

Healthcare

Healthcare Menu

Workers' Rights (/workers/)

Infectious Diseases

On This Page

Healthcare workers (HCWs) are occupationally exposed to a variety of infectious diseases during the performance of their duties. The delivery of healthcare services requires a broad range of workers, such as physicians, nurses, technicians, clinical laboratory workers, first responders, building maintenance, security and administrative personnel, social workers, food service, housekeeping, and mortuary personnel. Moreover, these workers can be found in a variety of workplace settings, including hospitals, nursing care facilities, outpatient clinics (e.g., medical and dental offices, and occupational health clinics), ambulatory care centers, and emergency response settings. The diversity among HCWs and their workplaces makes occupational exposure to infectious diseases especially challenging. For example, not all workers in the same healthcare facility, not all individuals with the same job title, and not all healthcare facilities will be at equal risk of occupational exposure to infectious agents.

The primary routes of infectious disease transmission in U.S. healthcare settings are contact, droplet, and airborne. Contact transmission can be sub-divided into direct and indirect contact. Direct contact transmission involves the transfer of infectious agents to a susceptible individual through physical contact with an infected individual (e.g., direct skin-to-skin contact). Indirect contact transmission occurs when infectious agents are transferred to a susceptible individual when the individual makes physical contact with contaminated items and surfaces (e.g., door knobs, patient-care instruments or equipment, bed rails, examination table). Two examples of contact transmissible infectious agents include Methicillin-resistant *Staphylococcus aureus* (MRSA) and Vancomycin-resistant enterococcus (VRE).

Droplets containing infectious agents are generated when an infected person coughs, sneezes, or talks, or during certain medical procedures, such as suctioning or endotracheal intubation. Transmission occurs when droplets generated in this way come into direct contact with the mucosal surfaces of the eyes, nose, or mouth of a susceptible individual. Droplets are too large to be airborne for long periods of time, and droplet transmission does not occur through the air over long distances. Two examples of droplet transmissible infectious agents are the influenza virus which causes the seasonal flu and *Bordetella pertussis* which causes pertussis (i.e., whooping cough).

Airborne transmission occurs through very small particles or droplet nuclei that contain infectious agents and can remain suspended in air for extended periods of time. When they are inhaled by a susceptible individual, they enter the respiratory tract and can cause infection. Since air currents can disperse these particles or droplet nuclei over long distances, airborne transmission does not require face-to-face contact with an infected individual. Airborne transmission only occurs with infectious agents that are capable of surviving and retaining infectivity for relatively long periods of time in airborne particles or droplet nuclei. Only a limited number of diseases are transmissible via the airborne route. Two examples of agents that can be spread through the airborne route include *Mycobacterium tuberculosis* which causes tuberculosis (TB) and the measles virus (/measles) (*Measles morbillivirus*), which causes measles (sometimes called "rubeola," among other names).

Several OSHA standards and directives are directly applicable to protecting workers against transmission of infectious agents. These include OSHA's Bloodborne Pathogens standard (29 CFR 1910.1030) (/laws-regs/regulations/standardnumber/1910/1910.1030) which provides protection of workers from exposures to blood and body fluids that may contain bloodborne infectious agents; OSHA's Personal Protective Equipment standard (29 CFR 1910.132) (/laws-regs/regulations/standardnumber/1910/1910.132) and Respiratory Protection standard (29 CFR 1910.134) (/laws-regs/regulations/standardnumber/1910/1910.134) which provide protection for workers when exposed to contact, droplet and airborne transmissible infectious agents; and OSHA's *TB compliance directive* which protects workers against exposure to TB through enforcement of existing applicable OSHA standards and the General Duty Clause of the OSH Act.

CDC Guidelines

Below is an abbreviated list of CDC resources available to assist HCWs in assessing and reducing their risks for occupational exposure to infectious diseases.

- Hand Hygiene in Healthcare Settings (https://www.cdc.gov/handhygiene/). This web page provides HCWs and patients with a variety of resources including guidelines for providers, patient empowerment materials, the latest technological advances in hand hygiene adherence measurement, frequently asked questions, and links to promotional and educational tools published by the World Health Organization (WHO), universities, and health departments.

- Guide to Infection Prevention for Outpatient Settings: Minimum Expectations for Safe Care (https://www.cdc.gov/HAI/settings/outpatient/outpatient-care-guidelines.html). This document is a summary guide of infection prevention recommendations for outpatient (ambulatory care) settings.
- Infection Control: Guideline for Disinfection and Sterilization in Healthcare Facilities (https://www.cdc.gov/infectioncontrol/guidelines/disinfection/index.html). Includes a link to a document (Guideline for Disinfection and Sterilization in Healthcare Facilities) that presents evidence-based recommendations on the preferred methods for cleaning, disinfection and sterilization of patient-care medical devices and for cleaning and disinfecting the healthcare environment. This document supersedes the relevant sections contained in the 1985 Centers for Disease Control and Prevention (CDC) Guideline for Handwashing and Environmental Control.
- Isolation Precautions (https://www.cdc.gov/infectioncontrol/guidelines/isolation/index.html). Includes a link to a document (Guideline for Isolation Precautions: Preventing Transmission of Infectious Agents in Healthcare Settings) intended for use by infection control (IC) staff, healthcare epidemiologists, healthcare administrators, nurses, other healthcare providers, and persons responsible for developing, implementing, and evaluating IC programs for healthcare settings across the continuum of care.
- Multidrug-resistant organisms Management (https://www.cdc.gov/infectioncontrol/guidelines/mdro/index.html). All healthcare settings are affected by the emergence and transmission of antimicrobial-resistant microbes. Provides information for the prevention of transmission of Multidrug Resistant Organisms (MDROs).
- Guidelines for Environmental Infection Control in Health-Care Facilities (https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5210a1.htm). (June 6, 2003). This web page provides guidelines, recommendations and strategies for preventing environment-associated infections in healthcare facilities.
- Guideline for Infection Control in Health Care Personnel, 1998 (https://www.cdc.gov/hicpac/pdf/InfectControl98.pdf). These guidelines address infection control procedures to protect workers from occupational exposure to infectious agents.
- Healthcare Workers (https://www.cdc.gov/niosh/topics/healthcare/). National Institute for Occupational Safety and Health (NIOSH) Workplace Safety and Health Topic. Healthcare is the fastest-growing sector of the U.S. economy, employing over 18 million workers. Women represent nearly 80% of this work force. Healthcare workers face a wide range of hazards on the job, including needlestick injuries, back injuries, latex allergy, violence, and stress.
- Eye Safety – Eye Protection for Infection Control (https://www.cdc.gov/niosh/topics/eye/eye-infectious.html). National Institute for Occupational Safety and Health (NIOSH) Workplace Safety and Health Topic. NIOSH recommends eye protection for a variety of potential exposure settings where workers may be at risk of acquiring infectious diseases via ocular exposure.

Specific Diseases

Bloodborne Pathogens

- Bloodborne Pathogens and Needlestick Injuries (/bloodborne-pathogens). OSHA Safety and Health Topics Page.

Cytomegalovirus (CMV)

- Cytomegalovirus (CMV) (/cytomegalovirus). OSHA Safety and Health Topics Page.

Ebola

- Ebola (/ebola). OSHA Safety and Health Topics Page.

Seasonal Flu

- Seasonal Flu (/seasonal-flu). OSHA Safety and Health Topics Page.

Pandemic Flu

- Pandemic Influenza (/pandemic-influenza). OSHA Safety and Health Topics Page.

Measles

- Measles (/measles). OSHA Safety and Health Topics Page.

MERS

- MERS (/mers). OSHA Safety and Health Topics Page.

MRSA

- Methicillin-resistant Staphylococcus Aureus (MRSA) Infections (https://www.cdc.gov/mrsa/). Centers for Disease Control and Prevention (CDC). Methicillin-resistant *Staphylococcus Aureus* (MRSA) is a type of staph bacteria that is resistant to certain antibiotics which include methicillin and other more common antibiotics such as oxacillin, penicillin, and amoxicillin. This web site has links to numerous other web sites that provide information for protection of healthcare workers from MRSA infections.
- MDRO - Multidrug-Resistant Organisms – MRSA (/etools/hospitals/hospital-wide-hazards/biological-hazards#accordion-80685-collapse2). OSHA. This is the Methicillin-resistant *Staphylococcus aureus* (MRSA) portion of the multi-drug resistant organism module of OSHA's Hospitals eTool (/etools/hospitals). This electronic aid provides information to help stop the spread of MRSA among employees and others working in healthcare and other industries. Your local public health agency has information on what your community is doing to prevent the spread of MRSA.

Norovirus

- A Norovirus Outbreak Control Resource Toolkit for Healthcare Settings (https://www.cdc.gov/hai/pdfs/norovirus/229110-ANorovirusIntroLetter508.pdf). Centers for Disease Control and Prevention (CDC). Because of high levels of contact and vulnerable patient populations, healthcare settings can be particularly susceptible to outbreaks of norovirus. To help address the challenges of managing and

controlling norovirus gastroenteritis outbreaks in healthcare settings, the CDC offers a toolkit for healthcare professionals including up-to-date information, recommended infection control measures, and tools for outbreak response coordination and reporting.
- Noroviruses (/sites/default/files/publications/norovirus-factsheet.pdf). (May 2008). OSHA Fact Sheet. Although noroviruses are currently more of a concern to the general public than to workers, the increasing incidence of norovirus outbreaks exposes many different worker groups, especially healthcare workers (HCWs).

SARS

- Information Regarding Severe Acute Respiratory Syndrome (SARS) (/emergency-preparedness/sars). OSHA.

Tuberculosis

- Tuberculosis (/tuberculosis). OSHA Safety and Health Topics Page.

Zika

- Zika (/zika). OSHA Safety and Health Topics Page.

Additional Biological Agents

- Biological Agents (/biological-agents). OSHA Safety and Health Topics Page.

State Legislation

- California Code of Regulations, Title 8, Section 5199. Aerosol Transmissible Diseases (https://www.dir.ca.gov/title8/5199.html). Cal-OSHA's ATD standard protects laboratory workers, as well as, healthcare workers, emergency responders, and many others from exposure to droplet and airborne transmissible diseases when engaged in the performance of their duties.

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