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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 RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Though Defendants technically seek summary judgment against Plaintiff-Intervenor the Montana Nurses Association ("the Nurses"), their brief in support does not differentiate the Nurses from Plaintiffs. The Nurses are barely mentioned in the brief, and Defendants' arguments focus almost entirely on the patient- and employer-based claims that Plaintiffs assert (as opposed to the Nurses' employee/workplace claims).[1] For that reason, and to prevent redundancy, the Nurses join and incorporate by reference the arguments provided in Plaintiffs' Response to Defendants' Motion for Summary Judgment. The Nurses also join the Statement of Disputed Facts ("SDF"), filed concurrently herewith. Through this brief, the Nurses provide additional argument to the extent Defendants' claims may be read to apply to the Nurses uniquely, and in areas in which the Nurses' employee-based claims are particularly salient to resolution of the Cross-Motion.

I. APPLICABLE STANDARDS

It is well-established that "the party moving for summary judgment cannot sustain its burden . . . merely by asserting that the nonmovant lacks evidence to

[1] In failing to tailor their arguments in any way to the distinct claims made by the Nurses, Defendants' motion and brief in support may contravene both the requirements of Fed. R. Civ. P. 56(a) ("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" (emphasis added)) and L.R. 7.1(d)(1)(A) ("A motion, if opposed, must be accompanied by a brief in support" and "[f]ailure to timely file a brief will result in denial of the motion").

support its claim." 10A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2727.1 (4th ed. 2022). "Even after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1105 (9th Cir. 2000) (quoting *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991)). Judge Fletcher articulates the appropriate standard on Defendants' Cross-Motion:

> A moving party without the ultimate burden of persuasion at trial—usually, but not always, a defendant—has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. In order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact.
>
> If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial. In such a case, the nonmoving party may defeat the motion for summary judgment without producing anything. If, however, a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense. If the nonmoving party fails to produce enough evidence to create a genuine issue of material fact, the moving party wins the motion for summary judgment. But if the nonmoving party produces enough evidence to create a genuine issue of material fact, the nonmoving party defeats the motion.

Id. at 1102–03 (citations and quotation marks omitted).

The moving party's failure to develop the non-moving party's claims and defenses through discovery is not grounds for summary judgment. Nor does *Celotex* support the proposition that a "moving party without the ultimate burden of persuasion at trial may use a summary judgment motion as a substitute for discovery." *Id.* at 1105 (citing *Clark*, 929 F.2d at 608).

II. ARGUMENT

A. Preemption

As a preliminary matter, two errors undercut Defendants' preemption arguments. First, Defendants appear to confuse (1) standing to bring an individual claim *under* a federal statute, like the ADA, with (2) the necessary elements to prove that federal law preempts a contrary state law. The two are different inquiries. One need not be a live ADA plaintiff to demonstrate an injury in fact resulting from a conflict between state law and the ADA. Second, and related, Defendants argue that there is no conflict between state and federal law because Plaintiffs have not yet been subject to prosecution under one of them. Defendants insist this means there is no conflict—or at least no viable preemption case until the State of Montana or the EEOC or OSHA finds against one of the Plaintiffs.

Defendants' arguments confuse the necessary injury for proving a federal preemption claim. In the context of federal preemption claims,

> [i]t is well-established that, although a plaintiff must demonstrate a

> realistic danger of sustaining a direct injury as a result of a statute's operation or enforcement, a plaintiff does not have to await the consummation of threatened injury to obtain preventive relief.
>
> [I]t is sufficient for standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is a credible threat that the provision will be invoked against the plaintiff.

Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1015 (9th Cir. 2013) (quotation marks omitted) (quoting *Babbitt v. United Farm Worker*s, 442 U.S. 289, 298 (1979) and *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir.2003) (quoting *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154–55 (9th Cir. 2000)). Thus, in *Valley del Sol*, a minister and several community organizations who served undocumented immigrants challenged an Arizona immigration statute as preempted by federal immigration law. *Id.* The Ninth Circuit affirmed the district court's entry of a preliminary injunction over the defendants' objections that the challenged state law (1) did not apply to the plaintiffs (on the defendants' narrow reading) and (2) had not yet been enforced against the plaintiffs. *Id.* at 1015-1019. The plaintiffs there established a credible threat of enforcement and a particularized stake in the conflict between state and federal law.

The same principles control here. In this case, Plaintiffs and the Nurses (whose members are both employees and, for APRN members with their own practices, employers) are "engage[d] in a course of conduct arguably affected with

a constitutional interest"—they either operate, or are employed in, healthcare settings against which § 49-2-312 may be enforced if the healthcare setting abides by recognized standards of care for disease control and requires certain immunizations. The threat of enforcement is more than "credible." *See Valle del Sol*, 732 F.3d at 1015. Defendants concede they are already enforcing § 49-2-312 against healthcare settings for ordinary workplace vaccination requirements. Just this year, Defendants enforced the statute against a healthcare setting for requiring an influenza immunization—something the United States Supreme Court describes as a "common feature of the provision of healthcare in America." *Biden v. Missouri*, 142 S. Ct. 647, 653 (2022). *See* Doc. 83, Pls.' SUF 72.

In sum, Plaintiffs and the Nurses do not need to assert individual claims *under* the ADA, for example, to have standing to challenge § 49-2-312 on the basis that it is *preempted* by the ADA. Likewise, neither Plaintiffs nor the Nurses need to undergo an actual prosecution under § 49-2-312 to prevail on their conflict preemption claims. To the extent Defendants' preemption arguments turn on these misapprehensions, these portions of the Cross-Motion should be denied.

1. ADA Preemption

The Nurses join and incorporate by reference the arguments made by Plaintiffs in their Response. Setting aside whether Defendants' selective evidentiary citations even meet the initial burden of production required of a

moving party at summary judgment (the Nurses go unmentioned in Defendants' factual contentions on the ADA), record evidence cited by Plaintiffs plainly defeats the Cross-Motion by establishing the Plaintiffs and the Nurses are entitled to summary judgment on this claim.

2. The Occupational Safety and Health Act

The conflict between the Occupational Safety and Health Act ("OSH Act") and § 49-2-312 is described in detail in the Nurses' Brief in Support of Summary Judgment. Doc. 85 at 24-27. In short, vaccine preventable disease has long been recognized as a workplace hazard specific to healthcare settings. *See, e.g.*, 29 C.F.R. § 1910.1030 (OSHA bloodborne pathogen standard for healthcare workers). Because the Occupational Safety and Health Administration ("OSHA") has not written rules specifically authorizing private healthcare settings to require vaccinations—likely because the ability to require ordinary workplace vaccinations is a "common feature of the provision of healthcare in America," *Biden*, 142 S. Ct. at 653—the general duty clause applies. *Donovan v. Royal Logging Co.*, 645 F.2d 822, 829 (9th Cir. 1981). 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. Doc. 83, Pls.' SUF 25,34,39,42,47. The general duty clause preempts and § 49-2-312 yields.

In their Cross-Motion, Defendants attempt to cobble together a seemingly random assortment of evidentiary tidbits to conclude that Plaintiffs "*cannot* show that HB702 conflicts with the" general duty clause. Defendants' Brief In Support of Motion for Summary Judgment ("Br.") at 17 (emphasis added). Defendants' argument appears to be that healthcare settings in Montana do not actually require vaccinations (or did not prior to § 49-2-312), and thus vaccination requirements can play no role in freeing healthcare workplaces from the recognized hazard of vaccine preventable disease under the general duty clause. Br. at 17-18 ("The institutional Plaintiffs have never required vaccinations for Hepatitis B, Pertussis, or other communicable diseases"). But the bold assertion—vaccines were not actually required in healthcare settings before § 49-2-312—is both absent from the tidbits that Defendants parade in their brief and *demonstrably and indisputably false* as a matter of evidence in the record. When Defendants questioned Vicky Byrd about historic immunization requirements in Montana at the Nurses' 30(b)(6) deposition she said the following:

> Q. (By Mr. Mead) And when you say "it wasn't an issue," why is that?
> A. Because immunizations have previously been long-held standards of employment requirements to be a nurse. I became a nurse 33 years ago, and it was – you couldn't start working at the job unless

> you had your MMR and your TDAP then. There's new immunizations, of course, that have come forward since then, like Hep B or now even the varicella, the chicken pox. I had chickenpox when I was little, but…
> You know, we just embrace the evidence…

SDF 169: Rule 30(b)(6) Deposition of the Montana Nurses Ass'n ("MNA Dep"), 34:17 to 35:4. Defendants asked Dr. Wilson, who serves on a hospital credentialing committee in Montana, a similar question in her deposition and she gave a similar answer: yes, healthcare settings in Montana require the "common" workplace vaccinations described by the United States Supreme Court in *Biden v. Missouri*:

> A. But at Community Medical Center I am part of the credentials committee, and we review the application of all new members of the medical staff: physicians, nurse practitioners, Pas, who apply for hospital privileges. They would like to treat patients in our hospital. And as part of that application, we ask that people submit either proof of vaccination or proof of immunity in the form of antibody titers to a number of different diseases.

Exhibit A, Deposition of Dr. Lauren Wilson ("Wilson Dep."), 98:8-17. She reiterated the same has been true for every hospital at which she has ever worked:

> Q. And so it's your testimony that both Providence St. Patrick's and Community Health required disclosure about vaccinations for all vaccine-preventable diseases for you to work there?
> MS. MAHE: Objection. Misstates her testimony.
> A. So what I can speak to is my credentialing process at both hospitals in 2015 and my ongoing knowledge of the credentialing process at Community Medical Center. And we ask that applicants to the medical staff at Community currently submit either a proof – their vaccine record or proof of immunity to a number of vaccine-

> preventable diseases, and I, myself, was required to do so at both hospitals in 2015, and at every hospital I've ever credentialed at in the past.

Exhibit A, Wilson Dep., 99:8-18. Record evidence clearly establishes that healthcare settings in Montana utilized common vaccination requirements before § 49-2-312, contrary to Defendants' contrary suggestion in support of its OSH Act argument.

Defendants also appear to argue that immunization requirements—and the ability for healthcare settings to respond to employees according to their actual immunity status—cannot have anything to do with the general duty clause because OSHA has never cited Plaintiffs for a failure to mandate vaccinations. Br. at 19. But this argument likewise fails to meet the initial burden of production. It is a counterfactual, at best. It is unclear why OSHA would have acted against a Montana healthcare setting on these grounds prior to § 49-2-312. Before the statute's enactment, Montana resembled every other state in the country: it allowed private businesses and healthcare settings to render their own judgments about which immunizations to require, and how to respond to nonimmunized employees. It stands to reason that there would never be a prior enforcement action because the tectonic shift ushered in by § 49-2-312 disrupts baseline assumptions about how the American healthcare system operates to keep patients and healthcare workers safe. There is no basis for summary judgment on this ground.

Finally, Defendants cite a recent case—also cited by the Nurses in their own summary judgment motion—in which the Ninth Circuit held that COVID-19 is a *generalized* risk, not a specific *occupational* risk subject to the OSHA general duty clause. *See Flower World, Inc. v. Sacks*, 43 F.4th 1224 (9th Cir. 2022). Defendants characterize the holding correctly as it pertains to COVID-19. Defendants also appear to concede that this holding does not extend beyond the COVID-19 context. *See* Br. 19-20; *Flower World*, 43 F.4th at 1232-33 (concluding that "agricultural workers face no particular risk from COVID-19 other than those they share with citizens in general"). That is because the OSH Act and OSHA have long recognized other vaccine-preventable diseases as recognized workplace hazards specific to healthcare settings. Because this is the case, the general duty clause applies and requires healthcare settings to free their workplaces of these hazards. As described above, and in detail by Dr. Holzman, ordinary workplace vaccination requirements—and the ability to treat employees according to their actual immunization status—play a leading role in freeing healthcare settings from the hazard of vaccine-preventable disease outside the COVID context. These contentions are undisputed; Defendants disclosed no expert testimony on the relationship between non-COVID vaccinations and workplace safety, and their own expert Dr. Duriseti concedes that that certain non-COVID vaccinations are so beneficial that they should be required in the workplace. SDF

106; (Duriseti Report, Doc. 86-6 at 25) (given the benefits of vaccines such as MMR and the Hepatitis B vaccine, "clearly demonstrated reduction in transmission with high community vaccination rates requires more consideration than one's personal autonomy."). Section 49-2-312 pulls the rug out from under healthcare settings by interfering with these tools, and thus is preempted by the general duty clause under the novel conditions created by Montana's radical policy. The Court should deny the Cross-Motion as it pertains to the general duty clause.

Defendants' arguments about the requirement under 29 C.F.R. § 1910.502(c)(7) to develop and implement a COVID-19 plan fare no better on summary judgment. Though the Court likely need not reach this argument, given the express preemption of the CMS COVID-19 mandate and its wide reach, record evidence plainly contradicts Defendants' unsupported assertions and defeats this portion of the Cross-Motion. Defendants argue that vaccination requirements and the ability to "change terms and conditions of employment, or ascertain employees' vaccination status is . . . irrelevant to compliance" with the regulation. Br. at 21. Drs. Wilson and Holzman are just two of the various witnesses in discovery who testified to the opposite. Dr. Wilson disclosed her "opinion that healthcare settings must have actual knowledge of the immunity status of their workers" and that "healthcare settings must be able to condition and treat healthcare workers differently based on actual knowledge of their immunity

status." Doc. 86-7 at 9. Dr. Holzman wrote that "[i]n medicine and public health, we take a medical history or use investigative tools to gather pertinent information to help us understand risk and implement treatment and/or prevention plans" and that "to care for patients and employees in certain situations, public health and preventive medicine require healthcare settings to treat immune and unimmune individuals differently." Doc. 86-3 at 10. This portion of the Cross-Motion should be denied.

3. CMS Rule and Guidance claims

The Nurses join and incorporate by reference the Plaintiffs' arguments in their Response related to the CMS Rule and Guidance claims.

B. Right to Seek Health

None of Defendants' arguments about the "fundamental right to seek health . . . found in Article II, Section 3 of the Montana Constitution" establish an entitlement to summary judgment. *Montana Cannabis Indus. Ass'n v. State* ("*MCIA*"), 2012 MT 201, ¶ 22, 366 Mont. 224, 286 P.3d 1161.

First, Defendants make a legal argument that the Right to Seek Health is not implicated by the claims in this litigation because the Montana Legislature may freely abrogate the right. They cite the *MCIA* case, which held that the right did not entitle Montanans to free access to cannabis. Defendants correctly recite the Montana Supreme Court's observation that "right to seek health is circumscribed

by the State's police power to protect the public's health and welfare." *Id.* at ¶ 22. In so stating, the Montana Supreme Court cited *Wiser v. State, Dep't of Com.*, 2006 MT 20, ¶ 24, 331 Mont. 28, 129 P.3d 133, which expands on the "lawful ways" concept by clarifying that "one does not have the fundamental right" under Article II, Section 3 to exercise those rights completely "free of state regulation promulgated to protect the public's welfare." This much is uncontroversial as it pertains to the current case. But it is a leap too far—unsupported by the *MCIA* case, *Wiser*, or the text of Article II, Section 3—to read the Montana Constitution as permitting *any* regulation by the legislature under the "lawful ways" language. On Defendants' reading, though "fundamental," the Right to Seek Health would be meaningless—defenseless from legislative abrogation, so long as the legislature invades the right under the banner of "the public's welfare." On the contrary, § 49-2-312 acts *against* the public welfare and the public interest by elevating private, individual privacy interests above the public interest in public health. Montana law follows the equitable principles that "[a] person shall so use that person's own rights as not to infringe upon the rights of another," that "[n]o one should suffer for the act of another," and that "[i]nterpretation must be reasonable." Mont. Code Ann. §§ 1-3-205; -202; -233. Defendants' reading violates each, and would lead to absurd results; they have not established an entitlement to summary judgment on this basis.

Defendants also make a factual attack that there are "no facts showing that HB702 limits anyone's ability to seek health." Br. at 27. The Nurses are not mentioned in this portion of the brief, either, and thus Defendants fail to meet their initial burden of production as to them. The Nurses join and incorporate Plaintiffs' arguments on this score which defeat the Cross-Motion. Moreover, the Nurses developed contrary evidence—present in the expert disclosures and deposition testimony of Drs. Holzman and Wilson and the declaration and deposition of Vicky Byrd—that vaccine-preventable disease is a recognized *health* hazard specific to healthcare settings, and that § 49-2-312 directly impacts the ability for Montana nurses to enjoy the benefits of a safe and healthy workplace. Doc. 83, Pls.' SUF 25,34,39,42,47. In other words, it impacts Montana nurses' ability to seek health in lawful ways.

Finally, Defendants argue that Plaintiffs' and the Nurses' claims under the Right to Seek Health conflict with the interests of individuals who do not wish to be subject to vaccination requirements. But as the Montana Supreme Court made clear, the right to seek health bends toward the public interest. *See MCIA*, ¶ 22. Defendants do not establish an entitlement to summary judgment on this assertion, either.

C. Equal protection

The Nurses' equal protection claims are described in detail in their own

motion for summary judgment. In sum, in terms of the workplace risk from vaccine-preventable disease and the need for healthcare settings to be able to require ordinary workplace vaccinations and respond to people according to their actual immunization status, the Nurses' members who work in Exempted Facilities are similarly situated to those who do not. The distinction implicates a fundamental right under the Montana Constitution and does not survive strict scrutiny. It does not survive rational basis review under the Fourteenth Amendment of the United States Constitution because the purported state interest has zero rational relationship to the policy of the distinction. The distinction fails equal protection analysis because there is no "plausible policy reason for [the] classification, ... and the relationship of the classification to its goal is . . . so attenuated as to render the distinction arbitrary or irrational." *Boardman v. Inslee*, 978 F.3d 1092, 1118 (9th Cir. 2020) (citations omitted), *cert. denied*, 142 S. Ct. 387 (2021).

The Nurses join and incorporate by reference Plaintiffs arguments in their Response regarding the Defendants' equal protection arguments. On equal protection, too, the Nurses are totally absent from the Defendants' brief and thus Defendants' arguments largely elide the Nurses' claims or are addressed by Plaintiffs.

However, to the extent that Defendants' argument that individual plaintiffs

may not assert equal protection claims can be read to apply to MNA's members, the assertion is legally incorrect and turns on the same "who can sue" confusion that beguiles Defendants' preemption claims. No third-party standing analysis is required because the Nurses and the individual plaintiffs assert their own rights—they are themselves affected by § 49-2-312, even if the law purports to operate through the vehicle of others. It is well-settled that Plaintiffs may demonstrate an injury in fact and establish constitutional standing in challenges to laws that affect them, but do not *operate* on them directly. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded . . . if application of the regulations by the Government will affect them in the manner described above." (citations and quotation marks omitted)). In *Summers*, aesthetic interests were enough for an environmental group to show the standing of its members to challenge certain regulations that only operated on the Forest Service directly. *Id.* at 494-95.[2] Here the patients and the Nurses have acute, direct

[2] The Supreme Court observed that aesthetic interests were enough to establish standing for a portion of the challenged project; the government did not dispute standing as to that portion. But those claims were later settled, and the balance of the *Summers* decision addresses whether an affidavit filed later by one of the group's members that did *not* specify where he intended to travel could establish standing as to specific projects. The vagueness of the affiant's plans failed to establish a concrete injury necessary to support constitutional standing. *Id.* at 495-96.

interests in the safety of their healthcare and workplaces, interests that are substantially stronger than the aesthetic interests of the environmental plaintiffs described in *Summers*. *See also Warth v. Seldin*, 422 U.S. 490, 508 and 508 n.18 (1975) ("We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention . . . A particularized personal interest may be shown in various ways"). The individual plaintiffs have standing to pursue their equal protection claims, as do the Nurses to the extent the Court construes Defendants' argument as reaching the Nurses' members.

And on these claims, the Nurses' members in Exempted Facilities are similarly situated to those who are not. Vicky Byrd testified in her affidavit that based on her experience as a nurse and her work as CEO of the Montana Nurses Association, "nurses in hospitals, the offices of private physicians, APRN clinics, nursing homes, long-term care facilities, assisted living facilities, and other healthcare settings" are vulnerable to vaccine-preventable disease, "treat patients in varying degrees of health," "interact in close quarters for extended periods of time with coworkers and with patients," "are all the subject of CDC guidance, including CDC guidance on the immunization of health care workers," and "face the same workplace risks from vaccine-preventable disease." SDF 170: Doc. 85-1 at 4-5.

See also Holzman Dep. 91:22 through 93:18.

III. CONCLUSION

The Court should grant Plaintiffs' and the Nurses' Motions for Summary Judgment and deny Defendants' Cross-Motion.

DATED this 16th day of September, 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 Response to Defendants' 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 4,578 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 September 16, 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

Exhibit A

Montana Medical Association, et al. v
Austin Knudsen, et al.

Lauren Wilson
August 3, 2022

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things be zero because we never want anyone to have harm happen to them in a hospital.
Realistically sometimes things happen, infections of urinary catheters happen, transmission of a disease in a hospital happens, but we are striving for as close to zero as we can get because we want people to be able to come to hospitals and recover and be safe and not have anything bad happen to them, and that's actually a large part of what I do as a pediatric hospitalist is trying to look at what we call -- call quality improvement measures and look at, you know, when something bad happens, how could we have prevented it and how can we prevent it the next time.
Q. So I'm gonna use -- I -- I want to be clear that the next few questions, unless I specify differently, refer to -- if I have it here -- Community Medical Center in Missoula and Providence St. Patrick's Hospital in Missoula for the next few questions, and I'll let you know if we go outside of that but for purposes of these questions. Do both those healthcare providers have actual knowledge of the immunity status of all their workers currently?
MS. MAHE: Object to the form.

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MR. GRAYBILL: Objection. Foundation as well.
A. So I don't have direct knowledge of what the hospitals are tracking. I am not involved in the hiring process for nurses at either hospital. I'm not involved in the credentialing process for physicians at Providence St. Patrick's currently. But at Community Medical Center I am part of the credentials committee, and we review the application of all new members of the medical staff: physicians, nurse practitioners, PAs, who apply for hospital privileges. They would like to treat patients in our hospital. And as part of that application, we ask that people submit either proof of vaccination or proof of immunity in the form of antibody titers to a number of different diseases.
BY MR. CORRIGAN:
Q. And relating back to paragraph 18 of your expert report --
A. Yes.
Q. -- it says "Verifying vaccination or providing proof of immunity is a standard part of the onboarding process for hospital workers."
And I think you just referenced that.

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A. Yes.
Q. And so it's your testimony that both Providence St. Patrick's and Community Health required disclosure about vaccinations for all vaccine-preventable diseases for you to work there?
MS. MAHE: Objection. Misstates her testimony.
A. So what I can speak to is my credentialing process at both hospitals in 2015 and my ongoing knowledge of the credentialing process at Community Medical Center. And we ask that applicants to the medical staff at Community currently submit either a proof -- their vaccine record or proof of immunity to a number of vaccine-preventable diseases, and I, myself, was required to do so at both hospitals in 2015, and at every hospital I've ever credentialed at in the past.
BY MR. CORRIGAN:
Q. But to be clear, you're not speaking to all hospital employees. You're only speaking to a specific subset or yourself?
MR. GRAYBILL: Objection. Asked and answered.
A. I don't have direct knowledge of nurse

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hiring or other employee hiring. I'm speaking to physician credentialing at the hospital.
BY MR. CORRIGAN:
Q. And is it true that nurses and other employees also interact with patients?
A. Yes.
Q. And I believe you touched on this a minute ago, but I want to make sure we're clear. That the influenza vaccine, according to your knowledge for people that you were trying to credential, is not required to work at the hospital. Is that correct?
A. So the influenza vaccine is not part of our initial onboarding process, but each year in the fall the hospital provides influenza vaccination, asks employees to submit proof of their vaccination to employee health if they've received it elsewhere, and then tracks who's vaccinated and who is not, and those who are not vaccinated typically are required to take some other measures to protect patients and colleagues.
Q. I'll get to the last thing you just said in a second, but I want to make sure, which hospital were you referring to in that last statement?
A. That's true of every hospital that I've

record. The time is 12:26 p.m.
(Recess taken from 12:26 p.m. to 12:29 p.m.)
THE VIDEOGRAPHER: We are back on the record. The time is 12:29 p.m.
BY MR. CORRIGAN:
Q. Dr. Wilson, I have nothing further. I apologize for wasting the last couple minutes, but we appreciate you being here today and for being a good sport in this.
MR. CORRIGAN: And thanks very much to everybody, including Mr. Graybill and the court staff. So appreciate it.
THE DEPONENT: Okay.
THE VIDEOGRAPHER: That concludes the deposition. The time is 12:30 p.m.
(Deposition concluded at 12:30 p.m. Deponent excused; signature reserved.)

DEPONENT'S CERTIFICATE

I, LAUREN WILSON, the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing pages of typewritten material and that the same is, with any changes thereon made in ink on the corrections sheet, and signed by me, a full, true and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

LAUREN WILSON, Deponent.

Subscribed and sworn to before me this day of , 2022.

PRINT NAME:
Notary Public, State of
Residing at:
My commission expires:

MRS - Montana Medical Association, et al. vs. Austin Knudsen, et al.

C E R T I F I C A T E

STATE OF MONTANA)
: ss
COUNTY OF MISSOULA)

I, Mary R. Sullivan, RMR, CRR, and Notary Public for the State of Montana, residing in Missoula, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of LAUREN WILSON in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly reserved.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on August 14, 2022.