

FILED

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF RHODE ISLAND

2012 DEC -6 P-1:27

U.S. DISTRICT COURT  
DISTRICT OF RHODE ISLAND

SEIU HEALTHCARE EMPLOYEES :  
UNION, DISTRICT 1199, :  
Plaintiff :

v. :

MICHAEL FINE, M.D., in his official :  
capacity as Director of the :  
Rhode Island Department of Health, and :  
RHODE ISLAND DEPARTMENT OF :  
HEALTH, :  
Defendants. :

C.A. No.

CA 12- 894 ML

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action to enjoin defendants from implementing a regulation which permits the Director to mandate vaccinations, declare a "flu emergency," require health care workers to wear surgical masks, and punish workers who decline, in violation of the United States and Rhode Island Constitutions.

JURISDICTION

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367(a).

PARTIES

3. Plaintiff SEIU Healthcare Employees Union District 1199 ("District 1199") is a labor organization, representing employees in various health care facilities throughout Rhode Island. District 1199 brings this action on behalf of its members in their capacity as employees of health care facilities affected by the regulations.

4. Defendant Rhode Island Department of Health is an agency of the State of Rhode Island.

5. Defendant Michael Fine, M.D. is the Director of the Rhode Island Department of Health. He is named in his official capacity.

#### FACTS

6. On or about August 21, 2012, Defendant Fine issued a notice regarding proposed amendments to the *Rules and Regulations Pertaining to Immunization, Testing, and Health Screening for Health Care Workers* (“the Regulations”).

7. The proposed amendments to the Regulations required that all healthcare workers receive the influenza vaccine (“flu vaccine”). Those health care workers who were medically exempt from receiving the flu vaccine and those who refused the flu vaccine for other reasons would be required to wear a surgical mask for the duration of each direct patient contact in the performance of his or her duties at any health care facility. Those health care workers who violated the Regulations would be fined \$100 per violation and each such violation would be considered to constitute “unprofessional conduct” jeopardizing professional licensure.

8. A public hearing to consider the proposed amendments was conducted September 21, 2012. At the hearing, members and representatives of District 1199, as well as representatives of other organizations and the general public, voiced their concerns, which included (a) the lack of scientific evidence of health care worker to patient flu transmission, (b) a relatively low rate of flu vaccine effectiveness, (c) unresolved legal and civil rights issues and (d) ethical considerations. Written statements were also submitted.

9. On or about October 5, 2012, the Department of Health announced that it had adopted the Regulations, which generally require health care workers to wear a surgical mask

during each routinely anticipated direct patient contact during “any declared period in which the flu is widespread,” unless the worker has received a flu vaccine or has been medically exempted. A “declared period” is based on the Director’s determination that there has been a widespread outbreak of the flu in a particular facility or geographic area. Health care workers must certify annually their professional obligation to comply with the Regulations, upon penalty of \$100.00 and a *per se* finding of “unprofessional conduct” in violation of professional licensing regulations. The Regulations purport to trump contrary provisions of a collective bargaining agreement. The Regulations do not apply to patients, patients’ family members or to friends who visit or otherwise assist in the care of that patient in a healthcare facility.

10. Section 1.4 of the Regulations defines “direct patient contact” as:

[A]ny routinely anticipated face-to-face interaction with patients in a health care facility.

11. Section 1.6 of the Regulations defines as “healthcare worker” as:

[A]ny person who is temporarily or permanently employed by or at, or who serves as a volunteer in, or has an employment contract with, a health care facility, as defined in §2.1(a) of these Regulations, and has or may have direct contact with a patient in that health care facility. **This may include, but not be limited to, a physician, physician assistant, nurse, nursing assistant, therapist, technician, clinician, behavioral analyst, social worker, occupational, physical or speech therapist, phlebotomist, emergency medical service personnel, dental personnel, pharmacist, laboratory personnel, autopsy personnel, students and trainees, contractual staff not employed by the health-care facility; other health care providers, including those have privileges at, but are not employed by, the health care facility; and persons (e.g., clerical, dietary, housekeeping, laundry, security, maintenance, administrative, billing, and volunteers) not directly involved in patient care but potentially exposed to infectious agents that can be transmitted to and from a health care worker and a patient.** This term shall not apply to a patient’s family member or friend who visits or otherwise assists in the care of that patient in a health care facility.

(Emphasis added).

12. Section 2.1 defines "health care facility" as:

[A]ny institutional health service provider, facility or institution, place, building, agency, or portion thereof, whether a partnership or corporation, whether public or private, whether organized for profit or not, used, operated, or engaged in providing health care services, including but not limited to hospitals; nursing facilities; home nursing care provider (which shall include skilled nursing services and may also include activities allowed as a home care provider, or as a nursing service agency); home care provider (which may include services such as personal care or homemaker services or as a nursing service agency); rehabilitation centers; kidney disease treatment centers; health maintenance organizations; freestanding emergency care facilities, and facilities providing surgical treatment to patients not requiring hospitalization (surgi-centers); hospice care, physician ambulatory surgical centers and podiatry ambulatory surgery centers providing surgical treatment and nursing service agencies licensed under the provisions of RIGL Chapter 23-17.7.1.

(b) Except as provided in §2.1(c) of these Regulations, health care facility also includes organized ambulatory care facilities which are not part of a hospital but which are organized and operated to provide health care services to outpatients such as central services facilities serving more than one health care facility or health care provider, treatment centers, diagnostic centers, outpatient clinics, infirmaries and health centers, school-based health centers and neighborhood health centers.

(c) The term "health care facility" shall not apply to organized ambulatory care facilities owned and operated by professional service corporations as defined in RIGL Chapter 7-5.1, as amended (the "Professional Service Corporation Law"), or to a private practitioner's (physician, dentist, or other health care provider) office or group of the practitioners' offices (whether owned and/or operated by an individual practitioner, alone or as a member of a partnership, professional service corporation, organization, or association).

(d) Any provider of hospice care who provides such hospice care without charge shall be exempt from the licensing provisions of RIGL Chapter 23-17, but shall meet the "Standards of a Hospice Program of Care."

(e) Facilities licensed by the Department of Behavioral Healthcare, Developmental Disabilities and Hospitals and clinical laboratories licensed in accordance with RIGL Chapter 23-16.2, as well as Christian Science institutions (also known as Christian Science Nursing Facilities) listed and certified by the Commission for Accreditation of Christian Science Nursing Organizations/Facilities, Inc. shall not be considered health care facilities for purposes of RIGL Chapter 23-17.

(Emphasis added).

13. Section 5.0 of the Regulations provide:

5.1 A health care worker shall be exempt from the immunization requirements described in these Regulations provided that a physician, physician assistant, or certified registered nurse practitioner signs a medical exemption stating that the health care worker is exempt from a specific vaccine because of medical reasons, in accordance with Advisory Committee on Immunization Practices (ACIP) guidelines, and determined as acceptable by the facility. [See References 1 and 2 in the endnotes to these Regulations.]

5.2 A "period in which flu is widespread" is defined for purposes of these Regulations as a period that commences when the Director declares that there is an outbreak of influenza that is widespread within a particular facility, or within a defined geographic area in which the facility is located, or throughout Rhode Island; and that ends when the Director declares to such a health care facility or facilities that the outbreak is no longer widespread. Whenever the Director declares a "period in which flu is widespread" in a health care facility, within a defined geographic area, or throughout Rhode Island, the requirements in §5.0 of these Regulations for wearing surgical face masks shall apply only to those nonimmunized health care workers at facilities or in geographic areas for which the period is declared.

5.3 Any health care worker who provides proper annual notice of a §5.1 medical exemption to annual seasonal influenza vaccination prior to December 15 of each year to each health care facility in or at which he or she is employed or volunteering, or with which he or she has an employment contract, shall be required during any declared period in which flu is widespread -- as part of his or her professional licensing obligation -- to wear a surgical face mask for the duration of each direct patient contact in the performance of his or her duties at any health care facility. "Direct patient contact" is defined in §1.4 of these Regulations.

5.4 Any health care worker may refuse the annual seasonal influenza vaccination requirements described in these Regulations; provided, however, that he or she provides proper annual written notice of such refusal prior to December 15 of each year to each health care facility in or at which he or she is employed or volunteering, or with which he or she has an employment contract; and provided, however, that he or she who so refuses shall be required during any declared period in which flu is widespread -- as part of his or her professional licensing obligation -- to wear a surgical face mask during each direct patient contact in the performance of his or her duties at any health care facility. "Direct patient contact" is defined in §1.4 of these Regulations

5.5 Each such yearly notice required by §5.4 of these Regulations shall contain the following statement: "I refuse to obtain the annual seasonal influenza vaccination. I understand that, by refusing such vaccination, it is my professional

licensing obligation to wear a surgical face mask during each direct patient contact in the performance of my professional duties at any health care facility during any declared period in which flu is widespread. I understand that the consequence for failing to do so shall result in a one hundred dollar (\$100) fine for each violation. Failing to do so may also result in a complaint of Unprofessional Conduct being presented to the licensing board that has authority over my professional license. I understand that such licensing complaint, if proven, may result in a sanction such as reprimand, or suspension or revocation of my professional license.” Such statement shall be signed and dated by the health care worker each year that it is submitted to each health care facility at or in which the health care worker is employed, or with which he or she has an employment contract. No health care worker shall be required to explain his or her refusal to obtain an annual seasonal influenza vaccination, nor shall any health care facility inquire into the basis of such refusal.

5.6 Any health care worker who holds a license issued by the Department and who shall violate §5.3, §5.4 or §5.5 of these Regulations shall be subject, pursuant to RIGL §23-1-25, to a fine of one hundred dollars (\$100) for each such act. Each such act shall be considered to meet the definition of “unprofessional conduct” as used in each chapter of the Rhode Island General Laws that governs each health care worker’s respective professional license.

5.7 Each act that violates §5.3, §5.4 or §5.5 of these Regulations shall form a separate basis for each complaint that may be brought for disciplinary action, based on unprofessional conduct, before the licensing board that has authority over the health care worker’s license issued by the Department. The requirements of §5.3, §5.4 and §5.5 of these Regulations apply to each health care worker regardless of any provision in any collective bargaining agreement or other contract to which the health care facility and health care workers are parties, or of any written policy of the health care facility.

5.8 If the Director declares that a shortage exists for annual seasonal influenza vaccine, the Director shall be permitted to modify and/or suspend any requirement for some or all health care workers to obtain an annual seasonal influenza vaccination and/or any requirement for health care workers to wear surgical face masks during any direct patient contact in the performance of his or her professional duties in any health care facility; and shall be permitted to extend the deadlines in §5.3 and §5.4 of these Regulations.

5.9 Any health care facility that knowingly, willingly and expressly refuses to require its health care workers who have refused an annual seasonal influenza vaccination, or who have a §5.1 medical exemption, to wear a surgical face mask during each direct patient contact in the performance of his or her professional duties in any health care facility during any declared period in which flu is widespread shall be subject, pursuant to RIGL §23-1-25, to a fine of one hundred dollars (\$100) for each such violation committed by any health care worker who

is employed or volunteering in, or has an employment contract with, such facility. No health care facility shall be fined for the act of any health care worker who falsely informs such facility about his or her medical exemption and/or refusal pursuant to §5.1 or §5.4 of these Regulations.

5.10 Each health care facility shall provide at no financial charge an adequate supply of surgical face masks -- during any declared period in which flu is widespread at the 10 facility, in the geographic area in which it located, or statewide -- to any health care worker who has claimed a medical exemption to or has refused the annual seasonal influenza vaccination.

5.11 The purpose of these Regulations relating to annual seasonal influenza vaccination for health care workers is to protect the public as a whole, patients at health care facilities, and in particular those vulnerable to contracting annual seasonal influenza due to compromised immunity and other medical conditions. Health care workers each have a potential for spreading the disease of influenza to their patients, and it is the right of patients in health care facilities to be as safe as possible from the spread of this and other infectious diseases. The reasonable precaution of having each health care worker receive annual seasonal influenza vaccination is expected to significantly reduce the incidence of seasonal influenza in health care facilities. The purpose of allowing health care workers to wear surgical masks during direct patient contact during any declared period in which flu is widespread -- in the event they refuse, or have a medical exemption to, an annual seasonal influenza vaccination -- is to ensure patient safety and to reduce the chance of health care workers spreading the influenza virus. Scientific research has shown that the wearing of surgical face masks reduces the transmission of the influenza virus to other human beings. It is not the intent of these regulations to impose an unnecessary burden on health care workers but to effectively protect the public.

(Italicized in original)(underlined added).

14. On or about October 25, 2012, the Regulations took effect. However, the Director has not, to date, declared a flu outbreak.

***There is No Clinical Evidence that Vaccinating Healthcare Workers Protects Patients***

15. The four leading and most comprehensive reviews of all available epidemiological studies have concluded that there is no statistically significant scientific or clinical evidence that higher rates of vaccination of healthcare workers result in fewer cases of influenza and its complications among their patients. Michiels, B., et al., *A*

*Systematic Review of the Evidence on the Effectiveness and Risks of Inactivated Influenza Vaccines in Different Target Groups*. Vaccine, 2011. 29(49): p. 2601-2605; Jefferson, T., et al., *Vaccines for Preventing Influenza in Healthy Adults*, Cochrane Database Syst Rev, 2007. 7: p. CD001269; Thomas RE., *Influenza Vaccination for Healthcare Workers who Work with the Elderly: Systematic Review*. Vaccine. 2010;29(2): 344-356; *Guidelines in Disrepute: A Case Study of Influenza Vaccination of Healthcare Workers*, J. Street, T. Delany, Australian and New Zealand Jour of Public Health, Volume 36, No. 4 July 2012.

16. In a study published in the November 2011 issue of the journal Vaccine, the authors concluded that “[t]he benefit of vaccinating healthcare workers to protect their patients remains highly questionable and should not be mandatory at present.” Michiels at p. 2601-2605.

17. In the most recent peer reviewed study, published in July 2012, *Guidelines in Disrepute: A Case Study of Influenza Vaccination of Healthcare Workers*, the authors concluded that “[t]here is a paucity of evidence to support substantial investment in health care worker vaccination programs in order to protect patients from nosocomial (healthcare associated) influenza infection in hospital settings.” J. Street, T. Delany. The authors go on to state:

Therefore, it can be argued that there is, at present, no direct evidence to support universal healthcare worker influenza vaccination.



***There is No Evidence to Support the Finding that Wearing Surgical Masks Inhibits Transmission***

18. Contrary to Section 5.9 of the Regulations, there is no scientific evidence that the wearing of surgical masks by unvaccinated healthcare workers is protective for patients.

19. The Center for Disease Control (“CDC”) does not recommend the use of surgical masks for this purpose. To the contrary, research has shown that the more frequent hand to mouth, nose and/or eyes contact necessitated when workers don, duff and adjust their surgical mask can lead to more contamination and/or infection, not less. Cassanova, et al. *CDC’s Emerging Infectious Diseases*, 2008. Volume 14, No.8

20. Moreover, mask wearing potentially compromises patient care. Surgical masks reduce the ability for healthcare workers to be able to communicate – especially with older patients and others with hearing disabilities that rely on facial expressions and lip reading.

21. The Regulations confuse and contradict OSHA and CDC messaging. OSHA and CDC recommend that **patients** with flu like symptoms wear surgical masks; **workers caring for such patients** should wear fitted respirators because surgical masks do not provide adequate protection to workers from the airborne spread of the flu virus. OSHA’s Employer Guidance: Reducing Healthcare Workers’ Exposures to Seasonal Flu Virus. <http://www.osha.gov/dts/guidance/flu/healthcare.html>.

22. The Regulations undermine public trust by threatening to erode overall support for flu and other vaccines. Sandman, P et al., *Overselling Flu Vaccine*

*Effectiveness Risks Undermining Public Health Creditability*. November 2011.

<http://www.psandman.com/col/fluvox-effectiveness.htm>.

23. Forcing nurses and other health care workers to become nonconsenting patients – even for a flu shot – undermines the consensual nature of the health care relationship. In addition, the requirement that healthcare workers be vaccinated as a condition of employment will likely confuse the public who will ask that if healthcare workers won't voluntarily take the swine flu vaccine, why should they. Annas, G., *Opinion: Don't Force Medical Pros to get H1N1 Vaccine*, in *Newsday* 2009: <http://www.newsday.com/opinion/opinion-don-t-force-medical-pros-to-get-h1n1-vaccine-1.1496620>.

24. Mandatory requirements are premature, counter-productive and foment an adversarial relationship that can weaken trust. Steckel. *Mandatory Immunization of Healthcare Workers – An Ethical Discussion*, *AAOHN Journal* 2007, Vol 53, No. 1. The approach toward flu vaccination should be maximizing current best practice and education prior to supporting a mandatory approach. Rudner Lugo, N. *Will Carrots or Sticks Raise Influenza Immunization Rates of Healthcare Personal?*, *Amer. Jour. Infec. Control*, 2007, Vol 35, No. 1.

25. Based on the lack of firm scientific bases to support universal healthcare worker vaccination, or any correlation between use of surgical masks and flu transmission in the health care setting, along with a lack of epidemiological evidence documenting statistically significant transmission from healthcare workers to patients, as well as the deleterious effects outlined above, it is arbitrary, capricious and irrational for Defendants to adopt or implement these Regulations.

26. A sound evidentiary basis must precede the promulgation of any public health policy, especially one that could lead to discrimination and unwarranted disciplinary actions against Rhode Island's healthcare workers. Issuing such policies without such evidence also threatens to jeopardize the public's trust and support for flu vaccination. The public interest therefore favors enjoining implementation of these Regulations.

27. As a result of Defendants' unlawful actions, Plaintiff will suffer immediate and irreparable harm for which there is no adequate remedy at law.

**COUNT 1**  
**Violation of 42 U.S.C. §1983**  
**(Due Process Clause U.S. Constitution)**

28. Plaintiff hereby incorporates by reference Paragraphs 1-27 of the Complaint as though fully set forth herein.

29. Plaintiff's members have a fundamental right to pursue their profession under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

30. It is essential to a doctor, nurse, social worker or other healthcare worker that patients feel safe in their care, feel open to communicate and trust the worker. Healthcare workers accomplish these things with open communication and facial expressions. Wearing a surgical mask impedes healthcare workers' ability to gain trust, communicate openly and make patients feel safe.

31. By requiring Plaintiff's members to wear a surgical mask if they have not received the flu vaccine, Defendants have substantially and directly interfered with Plaintiff's members' right to pursue their profession in violation of the Due Process Clause.

WHEREFORE, Plaintiffs pray as hereinafter set forth.

**COUNT 2**  
**Violation of 42 U.S.C. §1983**  
**(Due Process Clause U.S. Constitution)**

32. Plaintiff hereby incorporates by reference Paragraphs 1-27 of the Complaint as though fully set forth herein.

33. The Due Process Clause of the Constitution requires that administrative regulations are rationally related to a legitimate state interest.

34. There is no clinical evidence that mandatory vaccination and/or wearing a surgical mask by asymptomatic persons prevents the spread of the flu to patients.

35. By requiring Plaintiff's members to receive the flu vaccine or wear a surgical mask, Defendants have enacted a regulation that is not rationally related to a legitimate state interest, and thereby violated the Due Process Clause.

**COUNT 3**  
**Violation of 42 U.S.C. §1983**  
**(Due Process Clause of U.S. Constitution)**

36. Plaintiff hereby incorporates by reference Paragraphs 1-27 of the Complaint as though fully set forth herein.

37. Plaintiff's members have a constitutionally protected interest in their continued employment and their professional licenses under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

38. As such, Plaintiff's members cannot be disciplined or licenses revoked or suspended without cause.

39. Pursuant to Section 5.6 of the Regulations, Defendants have predetermined that any unvaccinated worker who does not wear a mask meets the definition of "unprofessional

conduct” as used in the statute that governs each healthcare worker’s respective professional license. The Regulations do not provide for investigation into the conduct or a hearing.

40. By predetermining that not wearing a mask is per se unprofessional conduct, Defendants have violated Plaintiff’s members’ procedural due process rights to notice and an opportunity to be heard.

WHEREFORE, Plaintiff prays as hereinafter set forth.

**COUNT 4**  
**Violation of Article I § 2 of the Rhode Island Constitution**  
**(Due Process Clause)**

41. Plaintiff hereby incorporates by reference Paragraphs 1-27 of the Complaint as though fully set forth herein.

42. Plaintiff’s members have a constitutionally protected interest in their continued employment and professional licenses under Article I § 2 of the Rhode Island Constitution.

43. Pursuant to Section 5.6 of the Regulations, Defendants have predetermined that any unvaccinated worker who does not wear a mask meets the definition of “unprofessional conduct” as used in the statute that governs each healthcare worker’s respective professional license. The Regulations do not provide for investigation into the conduct or a hearing.

44. By predetermining that not wearing a mask is per se unprofessional conduct, Defendants have violated Plaintiff’s members’ procedural due process rights to notice and an opportunity to be heard.

WHEREFORE, Plaintiff prays as hereinafter set forth.

**COUNT 5**  
**Violation of 42 U.S.C. § 1983**  
**(Equal Protection)**

45. Plaintiff hereby incorporates by reference Paragraphs 1-27 of the Complaint as though fully set forth herein.

46. The Regulations treat healthcare workers who are not immunized differently than those who are immunized. Healthcare workers who do not receive the flu vaccine are required to wear a surgical mask during a period in which flu is declared to be widespread, while those who receive the flu vaccine are not required to wear masks.

47. In the absence of scientific evidence correlating mask use with a reduction in flu transmission, the Regulations do not serve a compelling state interest, lacks a substantial relationship to any important state interest, and are not rationally related to any legitimate state interest.

48. By the foregoing acts and omissions, defendants have violated the Equal Protection Clause.

WHEREFORE, Plaintiff prays as hereinafter set forth.

**COUNT 6**  
**Declaratory Judgment**  
**(The Regulations are Preempted by the National Labor Relations Act)**

49. Plaintiff hereby incorporates by reference Paragraphs 1-27 of the Complaint as though fully set forth herein.

50. The Regulations are preempted by the NLRA. The Supremacy Clause of the United States Constitution invalidates state laws that interfere with or are contrary to federal law. Even where Congress has not completely displaced state regulation in a specific area, state laws are nullified to the extent that they actually conflict with federal law or policy.

51. The Regulations conflict and interfere with health care workers' right to bargain with their employer pursuant to the National Labor Relations Act ("NLRA"). Section 157 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C.A. § 157 (emphasis added).

52. A policy that requires employees to wear surgical masks is a mandatory subject of bargaining pursuant to the NLRA. *See In Re Virginia Mason Hosp.*, 357 NLRB No. 53 (Aug. 23, 2011).

53. The Regulations purport to supersede any collective bargaining agreement. Section 5.7 provides that "[t]he requirements of §5.3, §5.4 and §5.5 of these Regulations apply to each health care worker regardless of any provision of any collective bargaining agreement or other contract to which the health care facility and health care workers are parties, or of any written policy of the health care facility." (Emphasis added).

WHEREFORE, Plaintiff prays as hereinafter set forth,

**COUNT 7**  
**Declaratory Judgment**  
**(The Regulations are Preempted by the Health Insurance Portability and Accountability Act)**

54. Plaintiff hereby incorporates by reference Paragraphs 1-27 of the Complaint as though fully set forth herein.

55. The Regulations are preempted by the Health Insurance Portability and Accountability Act (“HIPAA”). The Supremacy Clause of the United States Constitution invalidates state laws that interfere with or are contrary to federal law. Even where Congress has not completely displaced state regulation in a specific area, state laws are nullified to the extent that they actually conflict with federal law.

56. Title 42 U.S.C.A. § 1320d-6 provides:

(a) Offense

A person who knowingly and in violation of this part--

- (1) uses or causes to be used a unique health identifier;
  - (2) obtains individually identifiable health information relating to an individual;
- or

(3) discloses individually identifiable health information to another person, shall be punished as provided in subsection (b) of this section. For purposes of the previous sentence, a person (including an employee or other individual) shall be considered to have obtained or disclosed individually identifiable health information in violation of this part if the information is maintained by a covered entity (as defined in the HIPAA privacy regulation described in section 1320d-9(b)(3) of this title) and the individual obtained or disclosed such information without authorization.

57. “Health information” is defined as:

[A]ny information, whether oral or recorded in any form or medium, that—

(A) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

(B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

42 U.S.C.A. § 1320d(4).

58. “Individually identifiable health information” is defined as:

[A]ny information, including demographic information collected from an individual, that--

(A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and



(B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and—

(i) identifies the individual; or

(ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

42 U.S.C.A. § 1320d(6).

59. The Regulations require those who do not receive the flu vaccine to wear a surgical mask during a period in which flu is declared to be widespread, thereby identifying workers who have received the vaccine. The Regulations thereby require health care workers to reveal protected health information.

60. To the extent the Regulations require disclosure of individually identifiable health information in violation of HIPAA, the Regulations conflict and interfere with HIPAA and are preempted.

WHEREFORE, Plaintiff prays as hereinafter set forth.

**PRAYER FOR RELIEF**

Plaintiff prays that this Honorable Court:

1. Issue a declaratory judgment that by enacting the Regulations, Defendants have substantially and directly interfered with Plaintiff's right to pursue their profession in violation of the Due Process Clause of the United States Constitution;
2. Issue a declaratory judgment that the Regulations are unconstitutional because they are not rationally related to any legitimate state interest;
3. Issue a declaratory judgment that by enacting the Regulations, Defendants have failed to provide Plaintiff's members with procedural due process under the United States and Rhode Island Constitution;

4. Issue a declaratory judgment that the Regulations violate the Equal Protection Clause of the United States Constitution;
5. Issue a declaratory judgment that the Regulations are preempted because they conflict and interfere with Plaintiff's members' right to bargain pursuant to the NLRA;
6. Issue a declaratory judgment that the Regulations violate HIPAA due to disclosure of individually identifiable health information.
7. Preliminarily and permanently enjoin Defendants, and each of them, from implementing and enforcing the Regulations;
8. Issue an Order rescinding the Regulations;
9. Award Plaintiffs their counsel fees and costs; and
10. Order such relief as the Court deems just and proper.

Plaintiff District 1199

By its attorneys,

  
\_\_\_\_\_  
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