



October 2, 2009

Richard F. Daines, MD
Commissioner
New York State Department of Health
Corning Tower
Empire State Plaza
Albany NY 12237

Dear Commissioner Daines:

The recently adopted emergency regulation (Subpart 66-3), which makes influenza vaccination a mandatory term and condition of employment for healthcare workers, has serious flaws that warrant its withdrawal. Members of the New York Committee for Occupational Safety and Health (NYCOSH) Pandemic Flu Task Force, which represents thousands of healthcare providers across the state, fully support efforts to curb the spread of the influenza virus. Educating and encouraging healthcare workers and other at risk employees to avail themselves of the influenza vaccine as one part of a comprehensive infection prevention program is strongly recommended by the coalition.

Voluntary vaccination rates can be increased.

The Department of Health (DOH) bases the need for mandatory vaccination on the low voluntary immunization rate among healthcare personnel; about 40% statewide. However, there *are* proven voluntary programs that have increased the rate to 80% or higher. These programs employ a three-pronged approach that targets specific objections to vaccination, provides the vaccine cost-free at a time and place convenient for workers, and fully integrates facility support from management down to front-line employees.

We are aware of existing DOH efforts to increase vaccination through informational kits, fliers, and posters. It is our experience that these efforts have not been fully embraced by the majority of healthcare employers and need to be bolstered. The mandate may actually impede educational efforts and cause a backlash among affected healthcare workers who are concerned about vaccine safety and their right to refuse an invasive procedure.

Vaccinations alone are not guaranteed to stop infection.

Healthcare institutions need comprehensive influenza infection control programs. Such programs will address how facilities will prevent the spread of infection in emergency room waiting areas overwhelmed by sick, contagious patients, and how and under what circumstances appropriate personal protective equipment will be made available to protect healthcare workers from becoming infected. Engineering controls to isolate contagious patients must be in place and functional. Punitive sick-leave policies that encourage employees to work sick must be abolished and replaced by policies that encourage sick employees to remain at home. Education about, and strict adherence to good hygiene practices for control of the spread of influenza must also be part of the comprehensive program. The DOH regulation does not address any of these critical influenza infection control issues. This failure on the part of the regulation may actually contribute to the spread of disease and infection of patients and staff.

It is crucial to remember the nature of the influenza vaccine, and why the mandatory focus as the primary means to control the spread of the virus is wrong. In years where the vaccine formulation is not closely matched to the circulating virus, the effectiveness of the vaccine is between 30% and 50%. Even when the vaccine and the circulating virus are well-matched, being vaccinated does not prevent individuals from contracting the virus – if they do, their illness will be less severe and of shorter duration. When these mildly ill healthcare providers come to work, they will be shedding the virus and infecting patients if they don't use appropriate infection control equipment and procedures.

If the intent of the regulation is to curtail the spread of the influenza virus, a comprehensive approach is the most prudent course of action. The thrust of this regulation however, is apparently not to reduce the spread of the virus but to increase the use of vaccinations.

In light of this fact, making vaccination a term and condition of employment appears punitive rather than motivational. This punitive measure will have a negative unintended consequence. Many surveys have already documented that healthcare workers may not show up for work if effective infection control programs are not in place. That, coupled with the dismissal from service of those healthcare workers who do not accept the vaccination, will effectively decrease the number of healthcare workers needed to care for the anticipated surge of patients. Already there are reports that hospitals intend to separate healthcare workers from service if they do not comply with the mandate. In fact the HHC, as well as facilities in the Albany area, have notified healthcare workers in writing that if they do not receive the vaccination they will be put on administrative leave without pay. If they continue to refuse the vaccination, they will be separated from service.

A recently released survey of 190 American hospitals from coast to coast found that nurses at 15% of the hospitals did not have access to proper respirators. More than one-fourth of the hospitals had inadequate or no engineering controls to isolate swine flu patients from uninfected patients. Nurses reported wide gaps in safety gear, infection control training and other prevention strategies. The documented lack of preparedness is a serious threat to public health, increasing the risk that our hospitals, not the healthcare worker, will become vectors of the virus.

Voluntary immunization is widely supported.

The Centers for Disease Control, the Society for Healthcare Epidemiology of America, the Federal Drug Administration, the Occupational Safety and Health Administration, the American Nurses Association, and other agencies strongly endorse a voluntary approach to immunizations. Members of the NYCOSH coalition fully agree. Well designed programs can achieve voluntary vaccination rates and adherence to a comprehensive infection prevention program upwards to 80%.

Respiratory protection is a key factor.

The DOH has issued guidelines stating that, for routine care of patients with suspected or confirmed H1N1, a surgical mask is appropriate protection. However, the federal CDC and OSHA, as well as the State Public Employee Safety and Health program, recommend the use of an N-95 or better respirator for routine care of patients with suspected or confirmed influenza illness. The Institute of Medicine issued their report last month on respiratory protection for health care workers who take care of patients with suspected or confirmed cases of the H1N1 influenza. The panel of experts state that health care workers should use an N-95 or better respirator when caring for these patients. They further state that surgical masks do not provide adequate protection for airborne spread of micro-organisms.

Research has shown that the influenza virus is spread three ways: through contact, large droplets, and airborne small particles. There is evidence that the airborne mode has an important role to play in the spread of the illness. Because it can enter the deep lung tissue more easily than the other two modes and can cause illness at lower doses than the other two modes, airborne transmission is the most hazardous of the three. On August 14, 2009, a hospital in New York City was cited by OSHA for failure to provide appropriate respiratory protection for workers exposed to patients who had the H1N1 virus. Two of the citations were Serious in nature.

The DOH-issued guidelines are not consistent with those of the CDC, OSHA, PESH and the IOM report.

Impact on healthcare personnel shortages has not yet been analyzed.

Another shortcoming of the regulation is that it does not allow for a cultural or philosophical objection to vaccination, essentially taking away the freedom of self-determination to accept an invasive procedure. It therefore removes an unknown number of the healthcare providers from the workforce. At a time when there will be a surge of patients with seasonal flu, and perhaps an additional surge because of the H1N1 virus, the loss of these healthcare providers will decrease the surge capability of affected facilities. The regulation does not consider the impact on the healthcare system of the employee who has to take sick time for a severe adverse reaction after receiving the vaccine under the mandatory requirement. These days away from work further decreases the already stressed staffing that will be needed during the flu season and may have been avoided if the employee had a choice, particularly if other more comprehensive strategies were in place.

Limited vaccine supplies are not well considered.

The regulation allows the Health Commissioner to suspend its requirements if there is a vaccine shortage. This “all or nothing” approach belies the intent of the regulation. If the intent is to prevent the spread of influenza virus, a wholesale suspension of its provisions does not make sense. The regulation instead should establish priorities and guidelines for using the vaccine when it is in limited supply. Furthermore, since the influenza outbreak will start in the community, taking a limited supply and mandating its use away from the greater public health need in the community will hamper efforts to get a pandemic under control. Putting emphasis on a secondary attack rate in a comparatively smaller exposure group than can be found in the larger community is counter productive to good public health measures.

For these reasons, the NYCOSH coalition and other signatories to this letter make the following recommendations to the New York State Department of Health:

- Withdraw regulations mandating healthcare personnel to receive flu vaccinations;
- Create a task force of stakeholders to assist in the development of a more effective, comprehensive approach to preventing the spread of influenza;
- Revise DOH guidelines on respiratory protection for workers to more clearly state the need for a hazard assessment when selecting the proper level of protection; and
- Establish the N-95 respirator as the minimum level of protection for direct care of patients, residents and clients who are suspected or confirmed to have an infectious respiratory illness.

We respectfully request a reply to this letter.

Sincerely,

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New York State Nurses Association
representing 37,000 registered nurses statewide

George Gresham, President
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representing 225,000 healthcare workers in New York State

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representing 35,000 academic and professional faculty on 29 New York State-operated SUNY campuses, including SUNY's four academic medical centers located in Brooklyn, Buffalo, Stony Brook and Syracuse

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