

Senate Bill 2274
Human Services Committee
February 13, 2023

Good morning, Chairwoman Lee and members of the Senate Human Services Committee. My name is Kylie Hall. I currently reside in north Fargo in District 45. I have a Master's Degree in Public Health, with an emphasis in the management of infectious diseases. I have spent the last 7.5 years working on vaccine-related projects at North Dakota State University in the Center for Immunization Research and Education, where I am currently the Operations Director. I would like to make clear that my comments today are not on behalf of North Dakota State University.

Public health promotes and protects the health of people and the communities where they live, learn, work and play. Whether you realize it or not, public health practices impact your life every single day. Public health is the clean air you breathe and the clean water you drink. Public health is safe roads for drivers and smoke free North Dakota. It's food safety. It's nutrition. It's cancer screenings. Public health is so many things, and this includes infection prevention and vaccination.

We have vaccines available for many different infectious diseases, and they are administered throughout our lifespans. Some vaccines are primarily for children or just for adults, while others are recommended based on health status or occupational exposures.

In public health, our recommendations and actions are based on what is best for a population or community, and then we do those things to protect ourselves and others. Admittedly, some public health measures are done at the expense of individual freedom. Here are just a few examples: 1) We've implemented speed limits to reduce risks associated with driving too fast. When I'm in a hurry to get somewhere, I still have to follow the speed limit laws to help protect those I share the road with. 2) We've implemented smoke free laws so people can breathe clean air in public and not be subjected to second-hand smoke, and this sometimes forces smokers outside in the middle of winter or when it is raining. 3) We have laws against drunk driving, to protect the driver, any passengers, and other drivers from this dangerous practice. 4) When my young children are sick with a fever, it is in the best interest of others in their daycare rooms to keep them home until they have been fever-free for at least 24 hours.

In these situations, I would like to ask you this question: "Why do we do this?" I think most would agree that these public health actions are necessary to preserve the health of a community or population.

At the heart of Senate Bill 2274 are the questions of, "Should you be able to treat people differently based on their vaccination status?" And, "Should differential treatment be labeled discrimination?" In certain situations, I believe it is imperative that we treat unvaccinated individuals differently as a matter of public health practice. Public health actions are not meant to discriminate, rather, they are done to protect others and mitigate risks.

As written, Senate Bill 2274 applies to all vaccines. There are many vaccine-preventable disease mitigation strategies which involve treating vaccinated and unvaccinated individuals differently. In these instances, if individuals are treated differently, it is not because public health entities are trying to discriminate against them, but because the health of a population or community may depend on disease control.

- Example 1: In the event of a measles outbreak on a college campus, it would be critically important to know who is vaccinated against the disease and who is not. If a student is not vaccinated against the disease, they may be required to quarantine, refrain from attending class, or have different living accommodations while the outbreak is occurring. This protects the unvaccinated student and other students. Their vaccinated counterparts would not have the same requirements. Under SB 2274, these actions would be deemed discriminatory.
- Example 2: A case of hepatitis A in a food handler would prompt close contacts who are unvaccinated to refrain from work for at least 30 days. If SB2274 were passed, unvaccinated and vaccinated employees could not be treated differently, so the business owner would have to decide between letting unvaccinated workers continue to work with the vaccinated employees (and potentially exposing more employees or customers) or keeping everyone out of work for an extended period of time.

I'd also like to address the impacts of this bill on the business community. This bill is an attempt to impose a government-knows-best, one-size-fits-all policy on private businesses. It would impact the business community significantly and employers' ability to manage their businesses and to make decisions that impact safety.

Not every employer – in fact, a small minority of employers – have, or likely ever would, require employees to receive a vaccine – a vaccine of any sort – as a condition of employment. However, when they do, it is not done arbitrarily. It is not a decision entered into lightly, as there are a variety of legal factors employers must consider in the context of making workplace vaccinations mandatory. Some employers have determined that requiring employees to be vaccinated is necessary in order to safeguard the health of other employees and their families, clients and visitors, or their communities.

You or I may disagree with an employer's determination that any infectious disease (hepatitis B, measles, influenza or COVID-19) poses enough of a risk within that workplace to warrant requiring employees be vaccinated. However, this bill takes the right to make that determination away from the employer, who knows their workplace better than anyone else.

Some may refer to SB 2274 as a freedom bill. But what about an employer's freedom to run their business the way they think is best? If you believe that employers should have the freedom to operate their businesses, to make decisions about protecting their workforce, and to develop the health and safety policies and practices that meet the needs of their individual workplaces, then you should vote "Do not pass" on this bill.

Montana House Bill 702 was passed in 2021, and it was very similar to SB2274. It is important for North Dakota to understand what has happened since this bill was passed.

[In December 2022, U.S. District Judge Donald Malloy](#) permanently blocked a section of the law the state said was meant to prevent employers – including many healthcare facilities- from discriminating against workers by requiring them to be vaccinated against communicable diseases, including COVID-19. His ruling stated, “The public interest in protecting the general populace against vaccine-preventable disease in healthcare settings using safe, effective vaccines is not outweighed by the hardships experienced to accomplish that interest.” In the interest of precedent, North Dakota will need to carve out an exception in this law for healthcare workers and healthcare facilities or it will likely be headed to the courts and the cost will be passed on to North Dakota taxpayers.

I also want to touch on the reasonable accommodations section of SB 2274. This bill leaves it up to the employer, and there is no clear guidance on what is considered “reasonable”. Who decides this? The state? The federal government? The employer? While one facility may require a surgical mask for unvaccinated employees, another may require regular testing and wearing of an N95 mask. One facility may require something completely different, possibly having unvaccinated individuals work in areas where they don’t have patient contact or in a different department or on a different floor. This will be confusing and frustrating for those trying to implement the law. And then you must ask yourself, “What if employees in North Dakota don’t agree with what their employer considers “reasonable”?”

Here’s another example of where this bill falls short: a facility that serves vulnerable populations, such as the Ronald McDonald House, would not be able to deny access to the facility or its services based on someone’s vaccination status or immunity passport. That would be considered discrimination. Now ask yourself, should we be able to ask about vaccination status (and potentially deny entry) when there’s an outbreak of a vaccine preventable disease, community transmission is high, and the facility is home to vulnerable patients and their families? This isn’t discrimination, but it is a public health measure meant to protect a medically vulnerable community.

Finally, I would like to point out that Rice University’s Baker Institute for Public Policy has published on a report on [Claiming the Unvaccinated as a Protected Class](#). I will include some of their report highlights below.

- In most cases, protected class designations are premised on a person’s “immutable characteristics” or inherent traits — those that are impossible or incredibly difficult to change. Laws that prohibit against discrimination based on intrinsic differences, rather than mutable or changeable characteristics like political leanings and group associations, are necessary in order to protect individuals from unjust treatment. Legal scholars note that “antidiscrimination law has moved beyond immutability” with respect to characteristics like religion and sexual orientation on the grounds that “such characteristics are very difficult, as a practical matter, to change, or ... are so fundamental to personhood that ‘it would be abhorrent for government to penalize a person for refusing to change them.’” In other words, it should be illegal to discriminate against a person based upon who they are as a person.

In contrast, one's choice not to vaccinate is not, as a general rule, outside of one's immediate control. Further, evidence shows that vaccine willingness is dynamic, and "opposition to vaccination is far from immutable." While a plaintiff may be able to argue that an employer's vaccine mandate results in a disparate impact by equating the failure to comply with the mandate to discrimination on the basis of gender or race, such an argument is likely to encounter high hurdles in light of past precedents.

Unlike existing anti-discrimination laws, extending civil rights protections to those who choose to refuse vaccination has a negative impact on others in the community — many of whom those existing laws are intended to protect.

- In 1905, there was a Supreme Court Ruling regarding a man named Henning Jacobson, who refused to be vaccinated against smallpox and was fined. In its reasoning, the Supreme Court recognized the inherent tension between individual rights and public health protection. It upheld the Massachusetts' law, holding that "the state has the right to interfere with individual liberty and immunize citizens if it determines that there is a valid public health reason to do so." It held that such laws are appropriate delegations of state police power: the power to enact reasonable measures to protect and secure the health, safety, and welfare of the community and its citizens. Such laws violate individual constitutional rights if they are arbitrary and unjustified in intent, extent, or enforcement. Laws that protect the health and welfare of citizens must therefore employ reasonable means to achieve reasonable ends.
- Generally speaking, when a law appears to treat individuals differently, courts defer to the legislative judgment that the distinction serves a rational purpose. And, in most cases, laws intending to protect public health have been seen to further a legitimate government interest, therefore establishing a rational basis for differential treatment.
- Calling practices that treat unvaccinated individuals differently "discrimination" equates unvaccinated individuals with those who have been historically disadvantaged and are protected by the Constitution or federal and state civil rights laws.
- If efforts to classify unvaccinated individuals as a suspect class succeed, state regulations seeking to control the spread of COVID-19, or other vaccine-preventable diseases, by mandating vaccines for its citizens would be subject to the highest level of scrutiny. Regulations that discriminate against a suspect class will only be upheld if the law furthers a compelling government interest and ensures the legislature/agency/government narrowly tailored the law to accomplish that interest. Under an equal protection clause analysis, without implicating a suspect class, public health laws do not violate individual liberties, because they further a legitimate government interest in protecting health, and there is a rational basis for differential treatment. In other words, such emergency orders bear a rational relationship to the legislative goal of protecting the public. However, when public health laws are "applied more harshly against members of racial and ethnic minority groups and other socially vulnerable groups than others," and the "differential treatment of protected groups is explicit in the law or can be proved intentional, the court will intercede" by limiting or striking down those laws.
- Vaccine mandates are not one-size-fits-all. Rather, vaccine mandates are permissible under certain circumstances: The disease is highly transmissible, serious and often lethal;

the vaccines are safe and effective; and crucially there is no equally effective alternative available to protect public health.” The ACLU has argued that “[f]ar from compromising civil liberties, vaccine mandates actually further them.” Rather than focusing on those who choose not to be vaccinated, the ACLU emphasizes that mandatory vaccination protects the most vulnerable in our communities, including individuals with disabilities, communities of color, and children too young to be vaccinated.

- In the context of prohibitions on employer vaccine mandates, laws that prohibit discrimination on the basis of vaccine status would tie employers’ hands, limiting their ability to keep employees and customers safe.
- Laws that designate the unvaccinated as a protected class would thwart efforts to protect the public from other highly transmissible viruses.
- Classifying unvaccinated individuals as a protected class is legally inconsistent with the history of vaccine mandates. Mandatory vaccines are, by their nature, an intrusion into individual autonomy and bodily integrity. However, the right to individual autonomy is not absolute and may be limited in circumstances where individuals pose a risk to others. In the context of COVID-19 {any many other vaccine-preventable diseases}, the risk of transmission and harm to others is great, particularly for at-risk individuals and communities. The Supreme Court held in 1905 that there are justifications for when such intrusions are necessary, and it is essential to continue to abide by this precedent.
- Efforts to declare the unvaccinated a protected could severely limit our ability to control highly transmissible and dangerous diseases. Countering these efforts will be a prolonged but necessary process to safeguard public health.

We need to remember that this bill applies to all vaccines. There may come a day down the road, maybe tomorrow or a year from now or ten years from now, when an infectious disease outbreak for which a vaccine is available wreaks havoc in North Dakota. And one of the tools we would normally have available, such as quarantining exposed individuals who aren’t vaccinated, will not be a tool we have in our toolbox because treating unvaccinated and vaccinated people differently is considered discrimination. This bill will limit public health actions to stop the spread of a disease. It will limit our ability to protect others. And ultimately, North Dakotans will suffer the consequences. We can’t see into the future, but I encourage you to think about the future when you vote on this bill.

Please vote “do not pass” on Senate Bill 2274.

Respectfully submitted,

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